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Supreme Court, U.S.
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In The

Supreme Court of the United States

COMMUNITIES FOR A GREAT NORTHWEST and NORTHWEST MINING ASSOCIATION,

Petitioners,

v.

ED ARGENBRIGHT, COMMISSIONER OF POLITICAL PRACTICES of the State of Montana, and MIKE COONEY, SECRETARY OF STATE of the State of Montana,

Respondents,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND, and CITIZENS FOR 1-125,

Respondents-Intervenors.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Whether the Ninth Circuit's decision permitting a ballot initiative to remain law, notwithstanding the District Court's factual finding that the government coercively suppressed virtually all political speech opposing passage of that initiative, conflicts with this Court's decisions commanding zealous protection of free speech.

2. Whether the District Court had the discretion under the First Amendment to refuse to invalidate a ballot initiative election, given that Court's factual finding that the government coercively suppressed virtually all political speech opposing passage of that initiative.

LIST OF PARTIES

Communities for a Great Northwest is a non-profit, non-partisan grassroots organization. Northwest Mining Association is a non-profit, non-partisan trade organization incorporated under the laws of the State of Washington. Both were Plaintiffs before the U.S. District Court for the District of Montana in CV-98-00037-CCL and Appellants before the U.S. Court of Appeals for the Ninth Circuit in Case No. 99-35032.

Montana Mining Association, Golden Sunlight Mines, and Yellow Band Gold, Inc., were Plaintiffs before the U.S. District Court for the District of Montana in CV-98-00037-CCL. These parties were not Appellants before the U.S. Court of Appeals for the Ninth Circuit. Continental Lime, Inc., was a Plaintiff before the U.S. District Court for the District of Montana in CV-98-00037-CCL and an Appellant before the U.S. Court of Appeals for the Ninth Circuit in Case No. 99-35032.

Respondents named herein are joined in their official capacities and were Defendants before the U.S. District Court for the District of Montana and Appellees before the U.S. Court of Appeals for the Ninth Circuit.

Respondents-Intervenors named herein were Intervenors-Defendants before the U.S. District Court for the District of Montana and Intervenors-Appellees before the U.S. Court of Appeals for the Ninth Circuit.

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OPINIONS BELOW

Review is sought of the opinion of the U.S. Court of Appeals for the Tenth Circuit, *Montana Chamber of Commerce, et al. v. Argenbright, et al.*, 226 F.3d 1049 (9th Cir. 2000), affirming the opinion of the U.S. District Court for the District of Montana. The Ninth Circuit's opinion appears at pages 1 to 30 of the Appendix. The opinion of the District Court for the District of Montana, *Montana Chamber of Commerce, et al. v. Argenbright, et al.*, 28 F.Supp.2d 593 (D. Mont. 1998), appears at pages 42 to 60 of the Appendix (referred to as App.).

JURISDICTION

The Supreme Court of the United States has jurisdiction to hear this case under Article III of the United States Constitution and has the power to grant *certiorari* under 28 U.S.C. § 1254. The judgment sought to be reviewed was entered on September 26, 2000, by the U.S. Court of Appeals for the Ninth Circuit.

CONSTITUTIONAL PROVISIONS INVOLVED

This Petition for *Writ of Certiorari* involves the First and Fourteenth Amendments to the United States Constitution. The First Amendment provides, in pertinent part, "Congress shall make no law . . . abridging the freedom of the speech, or of the press, or the right of the people peaceably to assemble . . . . " The Fourteenth Amendment

provides, in pertinent part, "[n]o State shall . . . deprive any person of . . . liberty . . . without due process of law."

STATUTES INVOLVED

The statues involved in this petition are Montana state ballot initiatives I-125 and I-137. The former was codified at Mont. Code Ann. § 13-35-227, but has been held unconstitutional on its face. App. 67. The latter has been codified at Mont. Code Ann. § 82-4-390. App. 68.

STATEMENT OF THE CASE

In this case, the Ninth Circuit failed to rectify a district court's inexplicable failure to protect political speech during an election campaign. The consequence of this failure is that Montana citizens are suffering daily under a law that passed only after the state government coercively and selectively suppressed virtually all opposition to passage of that law.

More specifically, the State of Montana used a selective gag law to suppress the free, political speech of the opponents of a complex ballot initiative during the months preceding the election in which that initiative was adopted. During those months, furthermore, the state allowed the promoters of the initiative to campaign unfettered. Montana thereby dictated which view of the initiative the electorate was permitted to hear. Consequently, the electorate went to the polls knowing only one side of a very difficult issue. They did not know the views of the initiative's opponents.

Judge Lovell of the United States District Court for the District of Montana properly held that the gag law was unconstitutional on its face. App. 38. He also held that the principal opponents of the initiative had been denied the right to free, political speech until just prior to election day. App. 57. Despite this holding, however, Judge Lovell let the ballot initiative go to a vote and become law. App. 10, 39, 40-41. Later, both he and the Ninth Circuit refused to set the results of that vote aside. App. 20, 60.

The ballot initiative in question is Montana's I-137,[1] which purports to prohibit certain mining practices ("mining initiative"). App. 5. Assessing the desirability of this law involves complex issues of economics and environmental science and several Montana entities opposed it because, as Judge Lovell observed, it "could put them out of business." App. 57. Several other Montana groups opposed it because the groups were composed of persons whose employers could be "put [ ] out of business." These opponents included Communities for a Great Northwest and the Northwest Mining Association (collectively, "the Communities"), Petitioners in this case.

In Montana, however, it was illegal for the Communities to campaign against the initiative because of the selective gag law: section 13-35-227 of the Montana Code.[2] Under this gag law, no corporation or organization financed by corporations was permitted to make any

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[1] Now codified at Mont. Code Ann. § 82-4-390. App. 63.

[2] The gag law passed as ballot initiative I-125 in Montana's November 1996 election. I-125 amended Mont. Code § 13-35-227.

contribution or any expenditure in connection with any political campaign regarding any ballot initiative (with certain exceptions not applicable here). *Id.* Violation of the gag law subjected would-be political activists to personal liability in the form of severe fines. Mont. Code Ann. § 13-37-128. App. 68.

In February 1997, soon after the gag law went into effect, the Montana Chamber of Commerce ("the Chamber") filed suit challenging its constitutionality. App. 8. The case was assigned to Judge Lovell. While that suit was pending, the Montana legislature actually intensified the gag law's coercive, selective suppression of free, political speech. Montana House Bill 575, effective April 1997, made it illegal not only for corporations, but also for partnerships, cooperatives, non-profits, and other organizations to contribute to ballot initiative campaigns. App. 46. In February 1998, Judge Lovell held this expansion unconstitutional but left the original gag law in effect, pending trial. *Id.*

The drafters and proponents of the mining initiative then maneuvered to bring it to a vote while the gag law still stifled virtually all opposition to it. On May 18, 1998, the proponents obtained the necessary permission from the Montana Secretary of State (the "Secretary") to solicit signatures on a petition to place the mining initiative on the November 1998 ballot. Because of the gag law, the Communities were unable to resist these efforts. On July 16, 1998, the Secretary certified the mining initiative for inclusion on the ballot. App. 8.

Until the Secretary put the initiative on the ballot, the Communities had been content that the Chamber, in its pending suit, adequately represented their interests in the protection of free speech. The new mining initiative threatened the Communities' interests much more gravely and directly than did the gag law alone, however. Therefore, the Communities hastened to join the battle against the gag law and on September 1, 1998, filed their complaint in the present case. This new case, too, was assigned to Judge Lovell. App. 8.

In their complaint, the Communities sought a declaration that the gag law was unconstitutional. App. 83. They also sought "such preliminary injunctive relief as may be requested by separate application therefore." *Id.* Three days after filing their complaint, the Communities filed a motion for preliminary injunction seeking two forms of relief. First, the Communities sought exemption from the gag law so that the Communities could exercise their constitutional right to educate Montana voters regarding the mining initiative before election day. Second, in case the exemption was not granted, they asked for an injunction blocking a vote on the mining initiative. App. 87. On September 18, 1998, Judge Lovell consolidated the Communities' case with the Chambers' case and combined the hearing on the motion for injunction with the bench trial already scheduled for mid-October. App. 33. Judge Lovell sat as the trier of fact in both proceedings.

At the close of the trial, on October 22, 1998, Judge Lovell ruled from the bench that the gag law was unconstitutional on its face. App. 38. Although there was still plenty of time to enjoin voting on the mining initiative,

however, Judge Lovell declined to provide any further relief to the Communities or to the voting public. Instead, he held that the Communities' motion for preliminary injunction was "premature" and denied it. App. 39. Further, Judge Lovell held that the Communities had not yet lost at the polls, so they were not yet injured. He therefore suggested that the Communities return to court if the election were to go against them. App. 38-39. "[W]ho knows," he mused, the Communities "may be able to persuade the people" after all, and if so, "then there is nothing for the courts to rule on." *Id.*

By the time Judge Lovell finally invalidated and barred enforcement of the unconstitutional gag law, the richly financed, non-profit proponents of the mining initiative had been campaigning aggressively for several months. During that entire time, they were unfettered by the gag law, unchallenged by any coordinated opposition, and unopposed in their advocacy. The Communities, in stark contrast, had been unconstitutionally muzzled for all that time. They now had only eleven days to counteract the effects of their prolonged, state-coerced silence; to provide the voters of the entire state of Montana with the suppressed, complex facts about the mining initiative; and to sway the opinions of voters who had heard but one voice on the subject for months. Not surprisingly, the Communities' and other opponents' efforts failed on election day, November 3, 1998. The mining initiative passed by a margin of 53 to 47 percent, according to the Ninth Circuit (though the actual margin was narrower).[3] App. 10.

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[3] In reality, the margin of victory for the mining initiative was markedly narrower than the 6 percent difference (53

Following Judge Lovell's suggestion, the Communities went back to him on November 12, 1998, by which time no doubt remained that they had been "injured," even in Judge Lovell's view. In a second motion for an injunction, the Communities asked Judge Lovell to block official certification of the mining initiative vote count so as to prevent the initiative from taking effect as law. App. 112-113. In spite of his previous holdings, however, Judge Lovell denied this motion and offered as his only stated rationale that he had already denied the Communities' first motion. App. 10, 40-41. Judge Lovell further stated that, in denying the first motion, he had promised "a later opinion and order would fully set forth [the court's] findings of fact and explain its ruling." *Id.* He thus indicated that he would eventually explain his refusals to

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percent minus 47 percent) the Ninth Circuit cited. Fed. R. Evid. 201(b)(2) permits this Court to take judicial notice of actual election results. *Badillo v. City of Stockton, Cal.*, 956 F.2d 884, 887 n.1 (9th Cir. 1992) ("We have held that election results are an appropriate subject of judicial notice."); *Jenkins v. Red Clay Consol. School Dist. Bd. of Educ.*, 4 F.3d 1103, 1124 n.19 (3rd Cir. 1993). According to results published by the State of Montana, voters actually cast 169,991 ballots in favor of the initiative and 155,034 ballots against it, a margin of 14,957 votes. http://www.state.mt.us/sos/assets/elections/98gen/98gen.htm. Therefore, a change of only 7,479 out of 325,025 votes cast, or 2.2 percent, would have changed the result (*see id.*) without even accounting for the get-out-the-vote campaign Mr. Anderson prescribed (*see infra*, Part I(B)(2)). Further, more than twice as many counties rejected the initiative as accepted it, and the counties that rejected it did so by an average margin of 19.5 percent as compared to an average margin of acceptance of only 11.9 percent. *See id.*

grant the Communities any protection from the predictable effect of Montana's protracted, selective, coercive denial of their constitutional right to political speech. But Judge Lovell never did.

Instead, when Judge Lovell handed down his final opinion in this case one week later, it contained only this single statement about the mining initiative: "the court denies the Plaintiffs' preliminary injunction motion as to [the mining initiative] because the relief sought was premature as of the close of evidence." App. 60. The opinion contained no hint of the promised explanation of his failure to prevent the initiative from going to a vote or from becoming law once that vote had taken place.

The Communities appealed this inconsistent series of orders and denial of relief, but the Ninth Circuit merely compounded the error. Though a panel of the Ninth Circuit properly affirmed that the gag law was unconstitutional, its decision contained only three short paragraphs devoted to the mining initiative. In those few lines, the panel held "the question of whether [the] preelection request for injunctive relief should have been granted" was "moot." App. 19-20. Writing for the panel, Judge Rymer asked instead "whether the district court erred in refusing to invalidate the election" after the mining initiative had passed. Although his holding is largely unexplained, he seems to have held there was no error because there was evidence the gag law did not affect the Communities' ability to campaign, or that, if the gag law had such an effect, then eleven days was enough time for the Communities to recover. Further, he seems to have held that even if eleven days were not enough time for the opponents to recover from the gag, then holding a

fair, special election would be too expensive. App. 20. None of these findings is supported by reference to evidence, by citation of significant authority, or even by argument. Like the District Court orders they uphold, Judge Rymer's findings are but raw conclusions.

The state defendants sought rehearing and the Ninth Circuit ordered the Chamber and the Communities to file briefs in opposition to that request. The Ninth Circuit denied rehearing by Order dated February 20, 2001. App. 65-66. The Communities now petition this Court for *certiorari*.

REASONS FOR GRANTING THE WRIT

The decisions of this Court make clear that an electorate fully informed by free, political speech regarding all sides of a given ballot issue or candidate is a prerequisite for preservation of democracy. Such speech is among the most inviolable of constitutional guarantees. Consequently, the failure by the courts below to provide for an informed electorate in the adoption of a ballot initiative in Montana intolerably conflicts with the teachings of this Court. *Certiorari* is therefore necessary to rectify this conflict and the resultant constitutional injuries inflicted by the State of Montana on the Communities and all other citizens of Montana.

In addition, the Ninth Circuit's decision allowing the District Court to leave the mining initiative in effect conflicts with other circuits' decisions in like cases. Other circuits require district courts to invalidate elections

when plaintiffs show a reasonable possibility that a constitutional violation has affected the outcome of an election. Such a possibility clearly exists in this case. *Certiorari* is therefore required to resolve this conflict and to clarify that district courts have no discretion under the First Amendment to refuse to invalidate elections that could reasonably have been affected by suppression of political speech.

I. Allowing A Ballot Initiative To Become And Remain Law Despite The Government's Coercive Silencing Of The Initiative's Opponents Intolerably Conflicts With This Court's Command To Provide For An Informed Electorate By Zealously Protecting Political Speech.

In this case, the trier of fact unequivocally held that the State of Montana had completely "deprive[d]" the Communities of the ability "to communicate their political views" and "political ideas" to the electorate. App. 57. Further, the State of Montana continued to suppress the Communities' political speech until just days before the vote on a ballot initiative that "could put them out of business" (and their employees out of work). *Id.* Nevertheless, the Ninth Circuit allowed the initiative to remain law based on the assumption that either the gag law had no effect, that eleven days time was enough to recover from that effect, or that an untainted election would be too expensive. These holdings conflict with this Court's clear and longstanding rulings that political speech is among the most fundamental of constitutional

guarantees, is necessary for the preservation of liberty, and therefore is to be protected with utmost vigor.[4]

A. This Court Commands Zealous Protection Of The Right To Free Political Speech Because An Informed Electorate Is Necessary For The Preservation Of Democracy Itself.

Freedom of speech and freedom of the press are essential to the preservation of our constitutional system because if the public were permitted to hear only one side of any issue, then there would be little point in holding an election on that subject. Instead, this Court stated, "[d]emocracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues." *Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976). Properly bilateral debate is crucial, this Court has held, because "informed public opinion is the most potent of all restraints upon misgovernment." *Grosjean v. American Press Co.*, 297 U.S. 233, 251 (1936). Accordingly, "[t]he evil[ ] to be prevented [is] not the censorship of the press merely, but *any* action of the government by means of which it might prevent such free and general discussion of public matters. . . . " *Id.* at 249-50 (emphasis added). Echoing this Court, Judge

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[4] The constitutional protection of speech afforded by the First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (striking down Rhode Island ban on alcohol price advertising).

Lovell correctly found that "[f]reedom of speech regarding public affairs is one of the cornerstones of self-government[; a]nd self-government suffers when those in power suppress competing views on public issues from diverse and antagonistic sources." App. 59-60 (*quoting New York Times v. Sullivan*, 376 U.S. 254, 266 (1964), and *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (internal quotation marks omitted).

This Court's holdings in this regard are numerous, consistent, and unmistakable. *See, e.g., Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (the "right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society"); *Williams v. Rhodes*, 393 U.S. 23, 32 (1968) ("[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms"); *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (First Amendment protections "are not for the benefit of the press so much as for the benefit of all of us[; a] broadly defined freedom of the press assures the maintenance of our political system and an open society"); *Garrison v. State of Louisiana*, 379 U.S. 64, 75-76 (1964) ("speech concerning public affairs is more than self-expression; it is the essence of self-government"); *Associated Press v. United States*, 326 U.S. 1, 20-21 (1945) ("[the First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public"); *Martin v. City of Struthers, Ohio*, 319 U.S. 141, 143 (1943) (though "unconventional ideas might disturb the complacent," freedom of speech is "essential if vigorous enlightenment [is] ever to triumph over slothful ignorance").

Moreover, these First Amendment protections have two sides: each individual's freedoms of speech and of the press are entwined with society's interest in hearing that speech and receiving the information communicated by the media. "The Constitution often protects interests broader than those of the party seeking their vindication," this Court noted, and "[t]he First Amendment in particular serves significant societal interests." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). In fact, this Court has recognized that the electorate's interest in hearing free speech so as to become informed about the issues to be decided is even more important than the right to speak itself:

> It is the viewers and listeners, not the right of [speakers] which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by [other lawmakers].

Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969) (internal citations omitted). Quoting this Court's decision in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 641 (1994), Judge Lovell himself found, as a matter of law, that "[t]he purpose of the First Amendment is to allow 'each person [to] decide for him or herself the ideas and beliefs deserving of expression, consideration and adherence.' " App. 59 (brackets in original).

Therefore, suppression of political speech cannot be permitted and, when found, cannot go unrectified. This Court explained clearly that the government "is constitutionally disqualified from dictating the . . . speakers who may address a public issue" because "[s]uch power in government to channel the expression of views is unacceptable under the First Amendment." *Bellotti*, 435 U.S. at 784-86. Consequently, as this Court concluded long ago, "the door barring federal or state intrusion into this area cannot be left ajar: it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." *Stanley v. Georgia*, 394 U.S. 557, 563 (1969). In practice, these holdings mean that "[e]specially where, as here, the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended." *Bellotti*, 435 U.S. at 785-86 (footnote omitted). "As [this Court's] cases have held," therefore, "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status." *Anderson v. Celebrezze*, 460 U.S. 780, 792-93 (1983). Judge Lovell accepted the binding nature of these holdings in finding that "the First Amendment seeks to 'protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.' " App. 59 (*quoting McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995)).

Consequently, when the courts below allowed the mining initiative to become and remain law despite that

the State of Montana had coercively suppressed political speech about one side of the issue, the courts below created a clear and intolerable conflict with the decisions of this Court. *Certiorari* is necessary to resolve this conflict.

B. The State Of Montana Coercively Prevented The Opponents Of A Ballot Initiative From Expressing Their Political Views And Prevented The Electorate From Being Informed Of Those Views.

Despite the decisions of this Court commanding that liberty be protected by guaranteeing free speech, the State of Montana coercively prevented the opponents of a ballot initiative from expressing their political views to the electorate until eleven days before the election. Such were the factual findings of the District Court. Furthermore, all evidence in this case shows that eleven days was not nearly enough time for the Communities to recover from the effects of the gag law. The Ninth Circuit, however, made its own *de novo* finding of fact that the gag law did not actually silence the Communities, and that, even if it did, eleven days was enough time to recover. Those findings directly contravene the record and violate the rules of civil procedure.

1. The District Court Unequivocally Held That The Initiatives' Opponents Were Completely Silenced Until Just Eleven Days Before The Election.

Judge Lovell had held flatly that "[t]he corporate voice [was] *silenced*." App. 57 (emphasis added). Judge

Lovell went on to hold that the gag law completely "deprive[d] corporations of the ability to communicate their political views during ballot issue campaigns" and deprived them of their ability "to communicate political ideas directly to the electorate." *Id.* He elaborated on this holding in unmistakable terms:

> [The gag law] *precludes* corporations from directly resisting potential laws that could put them out of business. Requiring shareholders to fight the corporation's battles is an *ineffective* and illegal substitution for corporate speech rights. Perhaps almost as important, [the gag law] *prevents* the electorate from being exposed to diverse viewpoints on public policy issues.

Id. (emphasis added). Having been "silenced" and thereby "preclud[ed]" from publicly expressing their views, the Communities could not have made themselves heard. Because they could not be heard, Montana had "prevent[ed]" the electorate from learning the other side of what should have been a wide open public debate regarding the mining initiative. These conclusions are Judge Lovell's findings as the trier of fact. Therefore, Judge Rymer's holding—that some evidence indicated the Communities could campaign even with the gag law in effect—has no basis in the record (which explains why Judge Rymer cited no evidence). Therefore, Judge Rymer's false assertion that some evidence indicated the gag law had no effect cannot remove his holding from direct conflict with the decisions of this Court. *Certiorari* is necessary as a result.

2. The Uncontroverted Evidence Shows That Eleven Days Was Not Nearly Enough Time For The Opponents To Inform The Electorate About The Opponents' Views.

In the District Court, Jerome Anderson, a highly qualified expert in ballot initiative campaigns,[5] gave greatly detailed testimony regarding what the Communities would need to do in order to plan and execute a campaign against the mining initiative. He concluded unequivocally that eleven days time was not enough to complete these tasks, and no one contradicted him. Nevertheless, Judge Rymer found, or at least implied, that eleven days time was enough and that therefore the mining initiative could remain law. Because the record completely contradicts Judge Rymer's conclusion about the adequacy of time to recover from the gag law, Judge Rymer's conclusion cannot support his holding. His holding therefore remains in direct conflict with the decisions of this Court.

The record reflects that Mr. Anderson has been an attorney, campaign manager, and politician in Montana for over fifty years. Moreover, he recently served as chairman and manager of two campaigns against Montana

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[5] Mr. Anderson's credentials and testimony were entered into evidence in the Chamber's case (*see* App. 50) and remained in evidence for purposes of the present case (*see* App. 102). Judge Lovell consolidated the Communities' case with the Chamber's case because, as he wrote, it "benefits the court since it provides the court with all evidence in both cases before deciding either. . . . " App. 32.

ballot initiatives, I-115 and I-122, the latter being a mining-related initiative like the one in this case. Mr. Anderson also served four terms in the Montana legislature, served as a precinct committee member, held various levels of offices at the county level, including county chairman, was legal counsel to one of the major parties in Montana, and served as vice chairman of a national political party. App. 92-94.

Mr. Anderson testified that a successful campaign against a ballot initiative requires a process of about twenty separate steps, beginning with the employment of a campaign manager. In any campaign, the manager must develop staff, employ consultants, and analyze the ballot issue itself. From there, the campaign must develop a budget and raise initial funds, then start polling. With poll results and other technical data in hand, the campaign must then develop its message and position statements, then test them in focus groups. Meanwhile, the campaign must detect and analyze the activity of the initiative's proponents. The campaign must identity supporters, set up campaign offices and hire more staff, then develop a grass-roots effort throughout the state. With all of these elements in place, the campaign must develop and hone its strategy and create an additional budget predicated upon all these factors. The strategy must include a schedule of events, including public appearances, media buys, and the like. It must also include organizing of opinion leaders across the state, securing of group endorsements, developing a speakers' bureau, and creating press kits. Campaign advertising plans must include not only buying media access (time for broadcast

media and space for print media), but also developing advertising content. At the end, there must be an effort to get out the vote. App. 96-99.

After laying out the necessary tasks, Mr. Anderson testified that eleven days time was not enough to accomplish them. "Using a week or ten days of television and radio time immediately before the election is not effective," he said. Instead, "[a] consistent television and radio campaign that is continued for at least *four weeks* is critical to the success of an election educational effort." App. 104-106 (emphasis added). Moreover, such a last minute blitz was not even possible because "TV time must be prepurchased as early as *90 days* before use in order to obtain effective spot placement." *Id.* (emphasis added). Given these constraints on timing and the need for all this organization, staffing, funding, and coordinated activity, every scrap of evidence in the record demonstrates that it was not possible to mount a campaign in eleven days. "It's too late to mount an effective campaign at this point in time," Mr. Anderson testified. *Id.*

Not one scintilla of evidence in the record contradicts any of Mr. Anderson's testimony. On the contrary, the expert called upon to defend the gag law testified on cross examination that, indeed, grass roots organization, endorsements from opinion leaders, speaking engagements, newspaper editorial support, advertising, and direct mailing are all factors in a successful campaign. App. 110.

Nevertheless, after Judge Rymer's failed attempt to show that the gag law did not really silence the Communities, he justified leaving the mining initiative in effect

by pointing out that "[e]leven days remained" between the election and the lifting of the gag law. This observation is completely unexplained in Judge Rymer's opinion except for an earlier reference to "countervailing equitable factors" that must be balanced against the constitutional violation. App. 19-20. In effect, however, Judge Rymer makes this timing observation as though it clearly shows, without more, that even if the gag law had actually prevented the Communities from campaigning, as Judge Lovell held, the Communities had enough time to recover from their long, coerced silence.

As detailed above, there are absolutely no grounds for concluding that eleven days was enough time to overcome months of coerced silence in a complex ballot initiative campaign. Indeed, the record mandates the opposite conclusion. Consequently, Judge Rymer's unexplained reference to the eleven days remaining cannot support his holding that the mining initiative should remain law. *Certiorari* is therefore necessary to resolve the conflict between Judge Rymer's holding and the decisions of this Court.

3. The Ninth Circuit's *De Novo* Finding Of Fact That The Opponents Could Mount An Effective Campaign In Eleven Days Violates Fed. R. Civ. P. 52(a).

Whereas Judge Lovell determined that the gag law prevented the Communities from campaigning and made no findings regarding whether eleven days was enough time to recover, Judge Rymer found that the gag law did not prevent campaigning and that eleven days time was

plenty. These findings are *de novo* factual findings that violate Rule 52(a) of the Federal Rules of Civil Procedure, as well as the decisions of this Court.

Judge Lovell unequivocally held that Montana had "silenced" the Communities. Writing for the Ninth Circuit, however, Judge Rymer held that "there was evidence" the gag law "had no substantial impact" on the Communities' "ability to campaign." App. 20. Judge Rymer then attempted to defend the District Court's decision by pointing out that the Communities had eleven days to mount a campaign against the mining initiative, implying that eleven days time was enough to overcome the gag law's effects. In reality, however, the record contains no evidence that the Communities could campaign despite the gag law, and not surprisingly, Judge Rymer cited none. On the contrary, moreover, all evidence in the record indicates eleven days was nowhere near enough time to mount a campaign.

Judge Rymer's *de novo* findings in this regard violate the rules of civil procedure and the holdings of this Court. This Court has long since made clear that an appellate court violates Fed. R. Civ. P. 52(a) if it makes *de novo* factual findings, even where, as here, the District Court judge was the trier of fact.

> In applying the clearly erroneous standard to the findings of a district court sitting without a jury, *appellate courts must constantly have in mind that their function is not to decide factual issues de novo.* If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it

> been sitting as the trier of fact, it would have weighed the evidence differently.

Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985) (emphasis added; internal citations and quotations omitted) (*quoting Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969); *citing United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949); *and see also Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982)). Consequently, Judge Rymer's unsupportable factual conclusions do not remove his holding from direct and intolerable conflict with the decisions of this Court. *Certiorari* is necessary to resolve this conflict.

C. The Ninth Circuit's Reliance On "The Cost" Of Conducting A New And Constitutional Election As Justification For Leaving A Law In Effect That Passed In An Election In Which Political Speech Was Suppressed Conflicts Intolerably With This Court's Command To Protect Political Speech.

After his bankrupt attempts to affirm Judge Lovell's denial of relief on grounds of timing and lack of injury, Judge Rymer stated that Montana has an interest in "avoiding the costs of a special election." App. 20. He seems to have held, therefore, that even if the Communities did not have enough time to avoid grievous injury from the unconstitutional gag law, the Communities would just have to endure the harm for the greater common good because it would be too expensive to hold another election. That holding is absurd because even if a special election for the mining initiative were necessary

(and none is)[6], the injury is to the public and to constitutional democracy itself, not just to the Communities. Therefore, in light of this Court's clear command to protect political speech as the foundation of liberty, no strain on the guilty state's treasury could possibly justify suppression of viewpoints and creation of an uninformed electorate. Judge Rymer's holding intolerably conflicts

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[6] No special election is necessary for a ballot initiative, as opposed to an elective office, because an initiative can simply be placed on the next regularly scheduled ballot without leaving an office unfilled. This Court has recognized the existence of fundamental distinctions between candidate campaigns and ballot initiative campaigns. *Colorado Republican Federal Campaign Committee v. Federal Election Com'n*, 518 U.S. 604, 614-615 (1996). Candidate cases are different because courts are asked to take measures that would prevent a political office from being filled and would thereby prevent vital duties from being executed. In candidate cases, therefore, special elections must sometimes be held as soon as possible and at great cost. *See, e.g., Hadnott v. Amos*, 394 U.S. 358, 367 (1969) (ordering "state and local officials promptly to conduct a new election . . . for the various county offices contested by" the challengers). Here, though, no government or agency would be left headless in a time of crises; nor any crucial committee unbalanced by the absence of a legislator. No bill would go unpaid for lack of a comptroller, no alarm unanswered for want of a fire chief, nor any vicious dog uncaught. Instead of holding a special election, therefore, enforcement of the mining initiative could simply be enjoined until the initiative is placed on the next regularly scheduled ballot and voted on in the absence of the gag law. Alternatively, the Court could invalidate the election and allow the state to decide for itself whether a new, special election is necessary. *Marks v. Stinson*, 19 F.3d 873, 889-90 (3rd Cir. 1994) ("district court may simply invalidate the election, declare that there is a vacancy, and leave the decisions concerning a special election and the timing thereof to the appropriate state authorities").

with the decisions of this Court in this regard, and *certiorari* is necessary to rectify the error and to protect the Constitution.

II. *Certiorari* Is Required To Resolve The Conflict Among The Courts Of Appeals Regarding The Discretion Of District Courts To Deny A Remedy For Suppression Of Political Speech In Election Campaigns And To Place A Clear, Constitutional Threshold On That Discretion.

In addition to running afoul of this Court's command to protect political speech, the Ninth Circuit's decision conflicts with those of other circuits. Other circuits require invalidation of election results when it is reasonably likely that a severe constitutional violation affected the outcome. *Certiorari* is necessary to resolve this conflict. Furthermore, if it reasonably appeared to the courts below that the District Court may actually have had the discretion not to vacate the election, notwithstanding the suppression of political speech throughout the election campaign, then *certiorari* is necessary to clarify that the District Court had no such discretion. On a matter of such national importance, this Court should set a clear constitutional threshold for the vagaries of equitable relief.

A. Unlike The Ninth Circuit, Other Circuits Instruct District Courts To Invalidate Elections When Plaintiffs Show A Reasonable Possibility That A Severe Constitutional Violation Affected The Outcome.

It is well established among the circuits, including the Ninth Circuit (App. 20), that federal courts have the

discretion to invalidate state elections when "the election process itself reaches the point of patent and fundamental unfairness. . . . " *Gold v. Feinberg*, 101 F.3d 796, 801 (2nd Cir. 1996); *Touchston v. McDermott*, 234 F.3d 1133, 1145 (11th Cir. 2000); *Marks v. Stinson*, 19 F.3d 873, 888 (3rd Cir. 1994); *Bodine v. Elkhart County Election Bd.*, 788 F.2d 1270, 1272 (7th Cir. 1986); *Welch v. McKenzie*, 765 F.2d 1311, 1317 (5th Cir. 1985); *Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983); *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978). Alternatively, as Justice Kennedy put it while serving on the Ninth Circuit:

> Federal courts will enter orders to invalidate state election results where voters have suffered an unconstitutional deprivation of the opportunity to vote even when it is not clear that the outcome would have been affected, but such relief has been reserved for instances of willful or severe violations of established constitutional norms.

McMichael v. County of Napa, 709 F.2d 1268, 1273 (9th Cir. 1983) (Kennedy, J., concurring) (*citing Griffin v. Burns*, 570 F.2d 1065, 1080 (1st Cir.1978)). Because a severe violation of the right to political speech was present in this case, the District Court indisputably had the discretion to invalidate the election. The question is whether the District Court had the discretion not to do so.

In other circuits, district courts have no such discretion. The Seventh Circuit, for example, instructed a district court that "[i]f the Plaintiffs . . . show a reasonable possibility that [a] sham candidacy affected the outcome of the election, then the district court should order new primary and general elections." *Smith v. Cherry*, 489 F.2d

1098, 1103 (7th Cir. 1973) (*per curiam*). The record in the present case clearly shows that the gag law violated the Constitution and had at least "a reasonable possibility" of affecting the outcome of the mining initiative election. According to the rule in other circuits, therefore, the District Court in this case was without discretion to let the election stand. Thus, by affirming the District Court's decision not to disturb this particular election, the Ninth Circuit created a conflict among the circuits as to the boundaries of district courts' discretion to deny relief for the effects of profound constitutional violations during election campaigns. *Certiorari* is necessary to resolve this conflict.[7] This Court has granted *certiorari* on such

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[7] Further conflict results from the Ninth Circuit's decision not to reverse the District Court for failure to analyze whether enjoining or invalidating the mining initiative election was a proper remedy. *Compare Gjersten v. Bd. of Election Comm'rs for City of Chicago*, 791 F.2d 472, 479 (7th Cir. 1986) (reversing order to hold special election because district court failed to analyze whether plaintiffs "demonstrate[d] that the unconstitutional practice had a significant impact on the particular election they [sought] to have invalidated"). Although Judge Lovell issued three orders in which he purported to address this relief issue, he never did. In the first order—before the initiative went to a vote—Judge Lovell held that the question of relief was premature because the initiative was not yet law. He therefore did not address it. In the second order—after the election—Judge Lovell held only that he had already denied relief. In the third order, despite that the election had already occurred and the initiative had become law, Judge Lovell simply repeated that the challenge was premature. Judge Lovell never cited any authority for these conclusions and never explained his logic. In fact, there is no logic here; the putative rationale is self-contradictory nonsense. The Ninth Circuit's decision affirming Judge Lovell's decision without comment on Judge Lovell's lack

grounds before. *Hughes v. W.M.C.A. Inc.*, 379 U.S. 694, 694-695 (1965) (reason for granting *certiorari*: "Both of these cases, today affirmed summarily by the Court, raise serious problems concerning the scope of the discretion of a federal court to fashion interim relief in state reapportionment cases, matters not hitherto decided by this Court.")

B. *Certiorari* Is Necessary To Set A Clear Constitutional Threshold On District Courts' Discretion To Allow Elections To Take Effect When Those Elections Could Reasonably Have Been Affected By Suppression Of Political Speech.

In light of this Court's decisions regarding the necessity of free speech for the preservation of democracy, it ought to be undisputed that an election is void when a state selectively suppressed political speech for virtually all of the campaign preceding that election. To whatever degree this proposition is subject to dispute, however, *certiorari* is necessary to resolve that dispute.

Three aspects of this case are not subject to serious dispute. First, selection of an equitable remedy, such as the prevention or invalidation of an election, is a matter for the discretion of the district courts. *Hathorn v. Lovorn*, 457 U.S. 255, 271 n.25 (1982) ("District Court simply might void the results of any runoff elections. . . . We, of

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of analysis therefore conflicts with the Seventh Circuit's decision in *Gjersten*. *Certiorari* is necessary to resolve this conflict, as well.

course, intimate no view on the best form of relief, leaving that matter to the District Court's discretion"). Second, the district courts' discretion is limited, and therefore suffers occasional abuse. *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 639-640 (1976) (*per curiam*) ("[W]e hold that in shaping remedial relief the District Court abused its discretion in not initially ordering a single-member [voting district] reapportionment plan"). Third, the unconstitutional gag law in this case, having stifled one entire side of the debate for virtually the entire mining initiative campaign, had a "reasonable possibility" of "affect[ing] the outcome of the election." *Cherry*, 489 F.2d 1098 at 1103.[8]

Perhaps because of the clarity of this Courts' command to protect free speech, however, no case has ever presented such circumstances to this Court. As a result, some lingering uncertainty may remain as to the constitutional limits on district courts' discretion not to provide relief when selective, coercive suppression of free speech taints elections. *Certiorari* is necessary so that this Court

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[8] *See infra*, n.3; *Marks v. Stinson*, 19 F.3d 873 (3rd Cir. 1994) (affirming injunction preventing apparent election winner from taking office where "plaintiffs demonstrate[d] that the unconstitutional practice had a significant impact on the particular election they [sought] to have declared invalid"); *Coalition for Education v. Bd. of Elections*, 370 F.Supp. 42, 57 (S.D.N.Y.), *aff'd*, 495 F.2d 1090 (2nd Cir. 1974) (affirming order invalidating entire school board election where unconstitutional factor "could very well have modified the outcome of the election").

may clarify that an election must be enjoined or invalidated under such circumstances.[9]

CONCLUSION

A law remains in effect in Montana despite that its passage bore the poisonous taint of unconstitutional suppression of political speech. Further, that law continues to cause daily injury to those who—but for the abridgement of their participation in the electoral process—might well have succeeded in preventing the law from passing. To permit this situation to persist is to damage democracy itself. *Certiorari* is required to rectify this error by the Ninth Circuit and to make clear that no such corruption of the First Amendment will be tolerated.

Respectfully submitted,

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[9] The court need not necessarily order a special election, however, leaving that decision to the state. *See infra*, n.6.

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226 F.3d 1049

CAl. Daily Op. Serv. 7920, 2000 Daily Journal D.A.R. 10,517

United States Court of Appeals,
Ninth Circuit.

MONTANA CHAMBER OF COMMERCE; Sletten Construction; Lehrkind's Inc.; Kalispell Area Chamber of Commerce; Montana Hospital Association; Montana Farm Bureau; Montana Education Association, Plaintiffs-Appellees,

v.

Ed ARGENBRIGHT, in his official capacity as Commissioner of Political Practices, Defendant,

and

League of Women Voters of Montana, Montana Common Cause, Montpirg 2030 Fund and Citizens for I-125, Defendant-Intervenor-Appellant. Montana Mining Association; Northwest Mining Association; Communities for a Great Northwest; Golden Sunlight Mines, Inc.; Yellow Band Gold, Inc.; Continental Lime, Inc., Plaintiffs-Appellees,

v.

Ed Argenbright; Mike Cooney, Defendants,

and

League of Women Voters of Montana, Montana Common Cause, Montpirg 2030 Fund and Citizens for I-125, Defendant-Intervenor-Appellant. Montana Mining Association; Northwest Mining Association; Communities for a Great Northwest; Golden Sunlight Mines, Inc.; Yellow Band Gold, Inc.; Continental Lime, Inc.,

Plaintiffs-Appellees,

v.

Ed Argenbright, Defendant-Appellant,

and

Mike Cooney, Defendant,

and

League of Women Voters of Montana, Montana Common Cause, Montpirg 2030 Fund and Citizens for I-125,

Defendant-Intervenor.

Montana Chamber of Commerce; Sletten Construction; Lehrkind's Inc.; Kalispell Area Chamber of Commerce; Montana Hospital Association; Montana Farm Bureau; Montana Education Association, Plaintiffs-Appellees,

v.

Ed Argenbright, in his official capacity as Commissioner of Political Practices, Defendant-Appellant,

and

League of Women Voters of Montana, Montana Common Cause, Montpirg 2030 Fund and Citizens For I-125,

Defendant-Intervenor.

Montana Mining Association, Plaintiff,

and

Northwest Mining Association; Communities for A Great Northwest; Continental Lime, Inc., Plaintiffs-Appellants,

v.

Ed Argenbright; Mike Cooney, Defendants-Appellees,

and

League of Women Voters of Montana, Montana Common Cause, Montpirg 2030 Fund and Citizens For I-125,

Intervenor-Appellee.

Montana Mining Association, Plaintiff,

and

Northwest Mining Association; Communities for A Great Northwest; Continental Lime, Inc., Plaintiffs-Appellees,

v.

Ed Argenbright, Defendant,

and

Mike Cooney, Defendant-Appellant.

League of Women Voters of Montana, Montana Common Cause, Montpirg 2030 Fund and Citizens for I-125, Intervenor. Nos. 98-36256, 98-36257, 98-36261, 98-36266, 99-35032 and 99-35033.

Argued and Submitted Nov. 3, 1999
Submission Withdrawn and Deferred Nov. 10, 1999[1]

Resubmitted Sept. 20, 2000
Filed Sept. 26, 2000

William Perry Pendley, Mountain States Legal Foundation, Denver, Colorado, for the plaintiffs-appellants.

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[1] Submission of this case was deferred pending the Supreme Court's decision in *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000).

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Appeals from the United States District Court for the District of Montana; Charles C. Lovell, District Judge, Presiding. D.C. Nos. CV-97-00006-CCL, CV-98-00037-CCL.

Before: RYMER, HAWKINS, and McKEOWN, Circuit Judges.

RYMER, Circuit Judge:

These consolidated appeals involve the initiative process in Montana. Montana state officials and the League of Women Voters appeal the district court's decision, following a bench trial, that Initiative 125 (I-125), which prohibits direct corporate expenditures in ballot initiative campaigns, violates the First Amendment.[2] The Montana Mining Association and various organizations subject to I-125 sought to delay, and then to invalidate, the election in which voters approved Initiative 137 (I-137) (restricting certain types of mining) on the ground

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[2] The lead plaintiff in the action seeking to invalidate I-125 was the Montana Chamber of Commerce (Chamber). We shall refer to Ed Argenbright, the Commissioner of Political Practices, and other state officials against whom the action was brought as "Montana"; and to organizations led by the League of Women Voters of Montana, which were intervenors in the district court, as "League." Sometimes we shall refer collectively to all parties who support I-125 and seek to have the district court's decision overturned as "I-125 Proponents." Likewise, we shall sometimes refer to those who argue for affirmance as "I-125 Opponents." The ACLU of Montana filed a brief in support of the judgment of the district court holding I-125 unconstitutional.

that I-125 unconstitutionally constrained their participation in the election process. They appeal the district court's refusal to do either.[3]

We conclude that the constitutionality of I-125 is controlled by *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), and that the district court did not clearly err in its findings that corporate wealth had not distorted the ballot initiative process in Montana, and that in light of those findings, the First Amendment does not permit restricting corporate speech on public issues. Accordingly, we affirm the declaration that I-125 is unconstitutional.

Whether the court should have considered (and granted) MMA's request to delay the I-137 election is moot, and we cannot say that the court erred by later declining to invalidate it. We therefore affirm the judgment in the I-137 appeal as well.

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Montana voters approved I-125 in November 1996. I-125 amended Montana's elections law by prohibiting

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[3] We shall refer to the parties who sought to enjoin the I-137 election (and who appeal the court's refusal to do so) collectively as "MMA" and to other parties in the same way as in the I-125 appeal. (MMA also sought to have I-125 declared unconstitutional, and its arguments in this connection are treated along with those of the "I-125 Opponents" in the I-125 appeal.) The Montana Environmental Information Center, Montanans for Common Sense Mining Laws-For I-137, and the Montana Council of Trout Unlimited filed an amicus brief in support of affirmance of the district court's refusal to delay or nullify the results of the I-137 election.

direct corporate spending in connection with ballot issues.[4] Specifically, the initiative amended the statutory

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[4] Section 13-35-227 now reads [I-125 additions underlined]:

(1) *(a) Except as provided in subsection (4) a* corporation may not make a contribution or an expenditure in connection with a candidate, *a ballot issue,* or a political committee which supports or opposes a candidate, *a ballot issue,* or a political party.

(b) For purposes of this section, "corporation" refers to for-profit and nonprofit corporations.

(2) A person, candidate, or political committee may not accept or receive a corporate contribution described in subsection (1).

(3) This section does not prohibit the establishment or administration of a separate, segregated fund to be used for making political contributions or expenditures if the fund consists only of voluntary contributions solicited from an individual who is a shareholder, employee, or member of the corporation.

(4) The provisions of subsection (1) prohibiting corporate contributions to or expenditures in connection with a ballot issue do not apply to a nonprofit corporation formed for the purpose, among others, of promoting political ideas and that:

(a) does not engage in business activities;

(b) has no shareholders or other affiliated persons who have a private claim on the corporation's assets or earnings;

(c) does not accept foreign or domestic for-profit corporations as members; and

(d) does not accept in the aggregate more than 5% annually of its total revenue from (foreign or domestic for-profit corporations),

(5) A person who violates this section is subject to the civil penalty provisions of 13-37-128.

provision concerning "[p]rohibited contributions from corporations." Mont.Code Ann. §§ 13-35-227. Under I-125, corporations (other than non-profit corporations formed for solely political purposes) are prohibited from making a contribution or an expenditure in connection with a ballot issue. Corporations may establish and administer a separate, segregated fund that is allowed to solicit contributions from shareholders, employees, or members of the corporation, but not from the company itself.

The Chamber brought an action in federal district court seeking a declaratory judgment that the initiative was unconstitutional and an injunction restraining its enforcement. The court held on summary judgment that I-125 restricted core political speech, but that a trial was necessary to determine whether a compelling state interest justified the restriction.

Meanwhile, in July 1998, I-137 was certified for the November 1998 ballot. MMA, which opposed I-137, brought suit in September 1998 requesting a preliminary injunction that would either waive I-125 as applied to it, or delay the vote on I-137 until after the I-125 case was resolved. The district court consolidated the two actions.

The I-125 trial focused on the health of the Montana initiative process. I-125 Proponents presented evidence on the effect of corporate money in four unsuccessful Montana initiatives. Witnesses testified that corporate opponents substantially outspent initiative proponents in these races. Advocates for the initiatives testified that they believed the defeats resulted from large corporate expenditures in opposition. Political scientists testified

that large scale spending was very effective in initiative campaigns, especially when used in opposition to a ballot issue, and poll results showed that Montanans believe corporations had too much influence in elections. I-125 Opponents, on the other hand, produced evidence that a variety of factors influence election results and that the side spending less money prevailed in 50% of initiative elections. Further, they showed that Montana voter turnout was much higher than the national average, ballot drop-off was low, and the number of ballot issues remained constant over the past 20 years. Finally, I-125 Opponents offered expert testimony that the Montana political system was healthy and free from corruption.

In the I-137 phase, MMA showed that I-125 limited mining companies' ability to oppose I-137 and that I-137 was a significant economic threat to these companies. It also adduced expert testimony that a successful challenge to I-137 was no longer possible, even if the I-125 restriction were lifted, because the I-137 election was only two weeks away. Evidence on the other side showed that the mining companies spent approximately the same amount fighting I-137 as they did in their challenge to the Clean Water Bill, where the I-125 restrictions did not apply.

The district court found the I-125 Opponents' evidence credible and persuasive, accepting their expert's opinion that there is no corruption or appearance of corruption in Montana ballot issue elections. It held that I-125, perhaps facially and certainly as applied, infringes upon the First Amendment rights of speech and association of those subject to its prohibitions; that it was not

narrowly tailored to address only the campaign contributions and expenditures of large corporations; that requiring corporations to fund ballot issue campaign speech through separate, segregated funds (consisting of voluntary contributions from employees, officers, directors, and shareholders) deprives corporations of their ability to communicate political ideas directly to the electorate, which impermissibly chills their speech and association rights and precludes corporations from directly resisting potential laws that could put them out of business; that it prevents the electorate from being exposed to diverse viewpoints on public policy issues; and that the anecdotal evidence presented by I-125 proponents fails to prove that corporations could overwhelm the political speech of individual citizens in Montana to the detriment of the ballot initiative process. Accordingly, the court held, corporations are entitled to defend their economic interests by using the corporate treasury to fund their participation in ballot initiative campaigns. It therefore declared that I-125 is unconstitutional.

In this respect the court ruled in favor of MMA in the I-137 action, but it refused to enjoin the I-137 election on the ground that the relief sought was premature as of the close of evidence, October 22. On November 3, 1998, Montana voters adopted I-137 by a 53% to a 47% margin. MMA then moved to enjoin Montana from validating I-137 by certifying the election results, but the court indicated that it had already ruled and denied the motion.

Both judgments – that I-125 is unconstitutional and that the election in I-137 stands – were appealed.

By the time we heard oral argument in these consolidated appeals, the Supreme Court had granted certiorari in a campaign contribution case, *Shrink Missouri Gov't PAC v. Adams*, 161 F.3d 519 (8th Cir.1998), *cert. granted*, 525 U.S. 1121, 119 S.Ct. 901, 142 L.Ed.2d 901 (1999). We thought it prudent to defer our own decision until the Court had rendered its in *Shrink*. As it turns out, the Court's opinion, *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000), does not affect the disposition in these appeals.

II

We determine the constitutionality of I-125 de novo. *California Democratic Party v. Jones*, 169 F.3d 646, 647 (9th Cir.1999), *rev'd on other grounds*, ___ U.S. ___, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000). The district court's findings of fact are reviewed for clear error. *Sana v. Hawaiian Cruises, Ltd.*, 181 F.3d 1041, 1044 (9th Cir.1999). While we have not previously addressed the question, we agree with other circuits that have considered similar issues that review of the district court's decision not to delay or void the I-137 election should be for abuse of discretion. *Gjersten v. Board of Election Comm'rs*, 791 F.2d 472, 479 (7th Cir.1986) (decision to invalidate election is reviewed for an abuse of discretion); *Griffin v. Burns*, 570 F.2d 1065, 1079 (1st Cir.1978) (same).

III
I-125

Montana and League argue that corporations possess unique characteristics and legal advantages that permit

them to maximize the accumulation of capital in the economic marketplace. They indicate that I-125 was designed to assure that corporate participation in ballot initiative campaigns reflects actual public support for the corporation's political views, rather than the sheer economic power that a corporation derives from these state-created advantages. To that end, they point out, I-125 prohibits the use of corporate general treasury funds in ballot issue campaigns, while it permits corporations to participate through the use of segregated funds collected from employees, members and shareholders who wish to support the corporation's political activities. Further, they submit, I-125 is carefully tailored to adhere to the Supreme Court's rulings in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990), and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) (*MCFL*). They fault the district court's decision on a number of fronts: for failing to recognize the compelling state interests supporting I-125 in that the court believed the only type of corruption that would justify I-125's limits was quid pro quo corruption, whereas in *Austin* the Court declined to rely on that limited anti-corruption rationale; for holding that I-125 could be justified only by evidence that money was the most important variable controlling election outcome in Montana, instead of deferring to the legislative judgement that the special benefit conferred by the corporate form presents the *potential* for distorting the political process; and for finding that voter turnout in Montana is higher than the national average, that I-125 improperly "silences" corporations under *Bellotti* because

they retain the right to speak through segregated funds, and that I-125 is unconstitutional even under *Bellotti.*

The Chamber counters that I-125 abridges core First Amendment rights of political speech and association on issues of public policy. This abridgment of political speech in the context of ballot issue campaigns (by contrast with candidate contributions or expenditures) is contrary to *Bellotti* and unjustified by any compelling state interest. Additionally, the Chamber maintains, there is no evidence of corruption or that corporate contributions or expenditures have reduced voter turnout, caused voter fall-off on the ballot, or been the principal determinant of the outcome of a ballot issue campaign; to the contrary, it submits, the evidence shows that the Montana electoral process is healthy and that the most important factor which influences outcome is the development of a credible, concise and understandable campaign message. Finally, it contends, the use of the segregated fund permitted by I-125 is neither a constitutionally permissible alternative to direct corporate speech nor an effective means to communicate core political speech on public policy issues.

We do not wish to appear to give either position short shrift, because all parties have researched, briefed and argued the issues with exceptional ability and professionalism. Yet as we see it, the constitutionality of I-125 comes down to whether restricting corporate expenditures in the ballot issue process is controlled by *Bellotti,* even though I-125 (unlike the Massachusetts statute at issue in *Bellotti*) permits corporations to establish segregated funds through which others may contribute.

Like this case, *Bellotti* involved a limitation on corporate contributions or expenditures in the ballot issue process (there, in connection with a referendum). A Massachusetts statute prohibited such expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation," and further provided that no issue submitted to the voters which solely concerned individual taxation issues could be deemed to affect a corporation's property, business or assets. When a graduated income tax proposal was put on the ballot, several corporate entities wanted to spend money to publicize their views in opposition. Applying strict scrutiny and requiring the state to show both a compelling interest in prohibiting the "exposition of ideas" and narrowly chosen means to avoid unnecessary abridgment, the Court held that the statute must be invalidated. In doing so, it clearly distinguished elections involving *issues* from elections involving *candidates*. As Montana does here, the state argued in *Bellotti* that preserving the integrity of the electoral process, preventing corruption, and sustaining the active involvement of citizens in good government were important state interests that were threatened by corporate participation in discussion of a referendum issue. The Court noted that if the state's

> arguments were supported by record or legislative findings that corporate advocacy threatened imminently to undermine democratic processes, thereby denigrating rather than serving First Amendment interests, these arguments would merit our consideration. But there has been no showing that the relative voice of corporations

> has been overwhelming or even significant in influencing referenda in Massachusetts, or that there has been any threat to the confidence of the citizenry in government.

Bellotti, 435 U.S. at 789-90, 98 S.Ct. 1407 (citations omitted). It added:

> Nor are [the state's] arguments inherently persuasive or supported by the precedents of this Court. Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution "protects expression which is eloquent no less than that which is unconvincing."

Id. at 790, 98 S.Ct. 1407 (citations omitted).[5] Concluding that the statute prohibited protected speech in a manner unjustified by a compelling state interest, the Court invalidated it.

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[5] The Court analogized corporate speech on ballot issues to lobbying by corporations, which the First Amendment protects, *see California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-511, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972); *Eastern Railroad Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), *id.* at 791 n. 31, 98 S.Ct. 1407, and noted that "the direct participation of the people in a referendum, if anything, increases the need for the widest possible dissemination of information from diverse and antagonistic sources." *Id.* at 790, n. 29, 98 S.Ct. 1407 (citations and internal quotes omitted).

In *Austin*, the Court considered a Michigan statute that prohibited corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office, but did not prohibit corporations from making such expenditures from segregated funds used solely for political purposes. The Court acknowledged that requiring corporations to make independent political expenditures only through special segregated funds burdens corporate freedom of expression because "the corporation is *not* free to use its general funds for campaign advocacy purposes," *Austin*, 494 U.S. at 658, 110 S.Ct. 1391 (quoting *MCFL*, 479 U.S. at 252, 107 S.Ct. 616), but held that the state's rationale in supporting a regulation aimed at "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas" was compelling. *Austin*, 494 U.S. at 660, 110 S.Ct. 1391. The Court concluded that "the State's decision to regulate only corporations [was] precisely tailored to serve the compelling state interest of eliminating . . . the corrosive effect of political 'war chests.' " *Id.* at 666, 110 S.Ct. 1391. It therefore upheld Michigan's restriction on independent corporate expenditures in connection with candidate elections for state office.

Justice Brennan, who concurred in the majority's opinion, wrote separately, distinguishing the particular provisions at issue in *Austin* that prohibit corporations from using treasury funds only for independent expenditures in candidate elections, from the restrictions at issue in *Bellotti*, noting that "[a] corporation remains free, for

example, to use general treasury funds to support an initiative proposal in a state referendum." *Id.* at 676, 110 S.Ct. 1391 (Brennan, J. concurring). So did Justice Stevens, who observed that, "as we recognized in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), there is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other." *Austin*, 494 U.S. at 678, 110 S.Ct. 1391 (Stevens, J., concurring).

Montana and League are correct that I-125 is similar to the statutory scheme approved in *Austin* to the extent that both statutes allow corporations to set up segregated funds. However, as we read the Court's opinions, *Austin* does not turn on this difference from *Bellotti* so much as it does on the difference between expenditures for candidate elections and ballot issues. As the Court explained, in the context of candidate elections, "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." *Id.* at 660, 110 S.Ct. 1391. It is also true that the Court indicated in *Bellotti* that through a record or findings, Congress or a state might be able to demonstrate the danger of real or apparent corruption posed by corporate expenditures, 435 U.S. at 787 n. 26 and 789-90, 98 S.Ct. 1407, whereas in *Austin* the Court appears to have accepted the state's articulated interest in avoiding corruption without a record or findings, 494 U.S. at 659-60, 666, 110 S.Ct. 1391. But again, this appears to reflect the difference between restrictions on the corporate voice in public issue elections, and in partisan candidate elections.

Even if *Austin* may plausibly be read as undermining *Bellotti*, this is for the Supreme Court, not us, to say. As the Court has instructed, " '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.' " *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)). *Austin* cited *Bellotti* and did not overrule it. Therefore, we believe that *Bellotti* is still good law, and controls.

There is no question that a law requiring corporations to make independent expenditures (even for candidates) through a segregated fund burdens corporate expression. *Austin* and *MCFL* so recognize. The burden is even greater when the limitation has to do with independent expenditures in the ballot issue process, as speech on such issues is "at the heart of the First Amendment's protection." *Bellotti*, 435 U.S. at 776, 98 S.Ct. 1407.

Because the state's interest in preventing corporate wealth from distorting the political process is not obvious or compelling in connection with ballot issue elections, *Bellotti*, 435 U.S. at 789-92, 98 S.Ct. 1407, the district court in this case heard considerable evidence, both empirical and expert. It found that "the state has failed to produce evidence that would support a judicial finding that corporate wealth has dominated citizen voices to the detriment of the ballot initiative process." As there was evidence pointing in each direction, we cannot say the

court clearly erred in finding that there was no imminent threat to the democratic process.

It follows that I-125 unconstitutionally restricts public discussion in the ballot issue (initiative) process. As the Court concluded in *Bellotti* with respect to the Massachusetts statute, we conclude here that, " '[a] restriction so destructive of the right of public discussion [as I-125], without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment.' " *Id.* at 792, 98 S.Ct. 1407 (quoting *Thomas v. Collins*, 323 U.S. 516, 537, 65 S.Ct. 315, 89 L.Ed. 430 (1945)).[6] Its enforcement was, therefore, properly enjoined.

IV

I-137

Having determined that I-125 is unconstitutional, we must decide whether the district court should have delayed or invalidated the I-137 election. Although we have previously held that challenges to election procedures should be made before the election occurs, *see Soules v. Kauaians for Nukolii Campaign Committee*, 849 F.2d 1176, 1180-81 (9th Cir.1988) (post-election challenge came too late); *Chinese for Affirmative Action v. Leguennec*, 580 F.2d 1006, 1008 (9th Cir.1978) (parties must bring complaints forward for preelection adjudication), we have not expressly considered whether it is error for a court to

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[6] Given this conclusion, we need not reach the question of whether I-125 is "sufficiently tailored" to meet compelling state interests.

refuse to resolve such challenges on the footing that a pre-election challenge is premature. Nor do we need to do so now, for this issue, together with the question whether MMA's pre-election request for injunctive relief should have been granted, are moot.

This leaves only the question whether the district court erred in refusing to invalidate the election. A state election violates due process "if it is conducted in a manner that is fundamentally unfair." *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir.1998). Of course, "the voiding of a state election is a 'drastic if not staggering' remedy." *Soules*, 849 F.2d at 1180 (quoting *Bell v. Southwell*, 376 F.2d 659, 662 (5th Cir.1967)). In determining whether to void an election, we balance the constitutional violation against the "countervailing equitable factors" such as "the extremely disruptive effect of election invalidation and the havoc it wreaks upon local political continuity." *Soules*, 849 F.2d at 1180.

Here, even though there was evidence that I-125 had affected MMA's ability to campaign, there was also evidence that it had no substantial impact. Eleven days remained before the election after the district court lifted the I-125 restrictions. And the state has a significant interest in avoiding the costs of a special election. In these circumstances, we cannot say that the district court abused its discretion in failing to void the results of the election.

AFFIRMED.

McKEOWN, Circuit Judge, concurring:

I join in the opinion but write separately to underscore that First Amendment protection of political contributions is not absolute. Here, in light of the specific evidence presented and in light of the requirements of *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), the state failed to sustain its burden of articulating a compelling interest for the restrictions. This is not to say, however, that such compelling interests do not exist, even in the context of initiative elections. The Supreme Court's recent treatment of the evidentiary burden is instructive:

> The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised. *Buckley* demonstrates that the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible.

Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 120 S.Ct. 897, 907, 145 L.Ed.2d 886 (2000). Although *Shrink* concerned candidate elections, its reasoning on judicial scrutiny of state-asserted compelling interests applies with similar force to campaigns for ballot measures.

Legitimate policy concerns have prompted legislators to address the power of the corporate contributor. I believe that a statute may be carefully crafted and tailored to meet a compelling interest in preserving the integrity of the electoral process, such as where contributions so distort the political process that they undermine our democratic system. But that is a case for another day.

HAWKINS, Circuit Judge, dissenting:

We occasionally hear a case falling so squarely between two conflicting Supreme Court opinions that no matter which way we veer, we are likely to run aground. This is one of those cases. With *Bellotti* and *Austin*, the Supreme Court has laid out a difficult course for us to navigate in determining whether restrictions on corporate campaign spending are constitutional. Judge Rymer works her way admirably through this challenge, but in the end I am not convinced. At the risk of running off course myself, I choose a different line because I think it is more consistent with the development of Supreme Court precedent in this area and reflects a more sensitive understanding of the ways in which corporate spending can distort the electoral process. Although certainly not dispositive, this approach has the added benefit of upholding the expressed discernment of the people of Montana about these matters.

In *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976), the Court's first major campaign spending case, the plaintiffs challenged the Federal Election Campaign Act, which placed dollar limits on political contributions to candidates and on individual expenditures "relative to a clearly identified candidate."[1] The

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[1] The Act also limited campaign spending by candidates for various federal offices and spending for national conventions by political parties. It required that contributions and expenditures over a certain amount be reported and publicly disclosed, established a system for funding Presidential elections, and created the Federal Election Commission to monitor and enforce these regulations. *See Buckley*, 424 U.S. at 7, 96 S.Ct. 612.

Court held that the contribution limits were constitutional because the government has a compelling interest in eliminating corruption (or its appearance) in the electoral process, and the restrictions did not completely preclude individuals or groups from expressing their support of a particular candidate. *See id.* at 26-29, 96 S.Ct. 612. But the limits on individual expenditures were struck down. These restrictions, the Court held, could not be justified by the government's interest in battling corruption because independent spending in candidate elections presents little risk of quid pro quo bargaining. *See id.* at 45-47, 96 S.Ct. 612.

Shortly afterward, the Court decided *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), which involved a complete ban on corporate spending in referenda campaigns. Here, as in *Buckley*, the government argued that the restriction was justified by its interest in battling corruption and in preserving the integrity of the electoral process. *See id.* at 788-89, 98 S.Ct. 1407. The Court disagreed. "Referenda are held on issues, not candidates for public office," the Court stated. *See id.* at 790, 96 S.Ct. 612. And while a candidate may offer political favors in return for campaign contributions, a referendum cannot. As a result, "[t]he risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." *Id.*

Buckley and *Bellotti* focused much attention on the government's asserted interest in preventing quid pro quo corruption. Indeed, in a subsequent case, the Court stated that "preventing corruption or the appearance of

corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97, 105 S.Ct. 1459, 84 L.Ed.2d 455 (1985).

But twelve years after *Bellotti*, the Court was presented with a new asserted interest. In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990), a state statute prohibited corporations from using general treasury funds to make independent expenditures in candidate elections, but allowed them to set up segregated campaign funds to which employees, shareholders, and members could contribute. *See id.* at 655-56, 110 S.Ct. 1391. Because the statute targeted campaign expenditures, not contributions, the state could not justify it as a measure to fight quid pro quo corruption. *See Buckley*, 424 U.S. at 45-47, 96 S.Ct. 612. So instead, the state argued that "the unique legal and economic characteristics of corporations" created the risk of a different kind of corruption not based on political deal-making.

Four years earlier, the Court had itself identified this "new" form of corruption. In *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257, 107 S.Ct. 616, 93 L.Ed.2d 539 (1986) ("*MCFL*"), the Court explained that state laws grant corporations special advantages that not only allow them to play a dominant role in the economy, but permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace." The Court elaborated:

> The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political

> ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

Id. at 258, 107 S.Ct. 616.

The Court nonetheless struck down the corporate spending limits in *MCFL* as applied because the plaintiff was an ideological organization "formed to disseminate political ideas, not to amass capital." *Id.* at 259, 107 S.Ct. 616. But the plaintiff in *Austin*, the Michigan Chamber of Commerce, possessed several characteristics that made it more like a corporation and less like a nonprofit ideological group. *See Austin*, 494 U.S. at 662-665, 110 S.Ct. 1391. So the Court applied the analysis it had articulated in *MCFL* to uphold the statute.

Michigan's statute, the Court made clear, did not aim at traditional quid pro quo corruption. *See id.* at 659, 110 S.Ct. 1391. It targeted "a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660, 110 S.Ct. 1391. "The unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures," the Court stated. *Id.* "Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions. We therefore hold that the state has articulated a

sufficiently compelling rationale to support its restriction on independent expenditures by corporations." *Id.*

Austin did not expressly overrule *Bellotti;* in fact, Justice Marshall's opinion remained conspicuously silent about the relevance of its holding for state referenda.[2] But most observers have concluded that the Court's analysis undermines the distinction between candidate elections and referenda, which was the key to *Bellotti.* Although the traditional quid pro quo corruption may not be a problem in referenda, it is difficult to see why the distorting effects of corporate wealth – the "new corruption," as it has been called – would not be equally problematic in both contexts. Once *Austin* was decided, therefore, the natural conclusion was that a similar restriction on corporate spending in state referenda would be upheld in spite of *Bellotti. See* Thomas C. Goldstein, *Corporate Influence in Referenda: A Comment About the Prescription,* 1996 Ann. Surv. Am. L. 469, 473 (1996) (stating that "the Court in *Austin* substantially reversed course from *Bellotti*" and that "the expenditures in *Austin,* which were not coordinated with the candidate, were the rough equivalent of spending in referenda."); James B. Raskin, *Direct Democracy, Corporate Power and Judicial Review of Popularly-Enacted Campaign Finance Reform,* 1996 Ann. Surv. Am. L.Rev. 393, 408 (stating that a ban on corporate spending in ballot initiatives is "perfectly congruent with the Court's new and far more nuanced conception of 'corruption' "); Gerald G. Ashdown, *Controlling Campaign Spending and the New Corruption: Waiting for the Court,* 44

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[2] The opinion cited *Bellotti* only four times and exclusively on mundane issues.

Vanderbilt Law Review 767, 779 (1991) ("The conclusion is inescapable that legislatures are now free to restrict corporations to spend only from separate political funds *in ballot measures as well as candidate elections.*") (emphasis added); David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance,* 9 Yale L. & Pol'y Rev. 236, 252 (1991) ("[I]f corruption includes the distorting effects of large amounts of wealth on the political debate, corruption is no less troubling in referenda than in candidate elections. Thus, this distinction also seems destined to fall in light of the *Austin* Court's redefinition of corruption.").

Judge Rymer resists this conclusion. Although the Montana initiative is identical to the *Austin* statute in that it permits corporations to spend from a segregated fund – something the *Bellotti* statute did not allow – she asserts that the relevant distinction is between laws that regulate spending in candidate elections and laws that target spending in ballot initiatives or referenda. (Majority Op. at 1057). She does not explain how this traditional distinction survives *Austin*'s identification of a new form of corruption unrelated to quid pro quo bargaining. She only quotes *Austin*'s statement that "[c]orporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions." (Majority Op. at 1057). This statement, however, does not suggest that corporate wealth plays a greater role in candidate elections than in referenda. It merely describes the effect of corporate wealth in elections generally.

Judge Rymer appears to recognize this difficulty. As a result, she attempts to find support for her position in the

concurring opinions of Justices Brennan and Stevens in *Austin*. She suggests that Justice Brennan relied on the same distinction between candidate elections and referenda campaigns that she relies on here. Justice Brennan, she points out, noted that under the *Austin* statute, "a corporation remains free, for example to use general treasury funds to support an initiative proposal in a state referendum." (Majority Op. at 1056-57). The implication is that Justice Brennan's vote turned on the limited scope of the *Austin* statute.

A closer reading of Justice Brennan's statement undermines this implication. When Justice Brennan made this statement, he was responding to the dissent's claim that the statute was under-inclusive. He first acknowledged that the statute "is concededly under-inclusive insofar as it does not ban other types of political expenditures to which a dissenting . . . corporate shareholder might object." *Austin*, 494 U.S. at 675-76, 110 S.Ct. 1391. He then explained: "The particular provision at issue prohibits corporations from using treasury funds only for making independent expenditures in support of, or in opposition to, any candidate in state elections. A corporation remains free, for example, to use general treasury funds to support an initiative proposal in a state referendum." *Id.* at 676, 110 S.Ct. 1391.

The context of Justice Brennan's statement makes clear that he did not think the limited scope of the statute (i.e. that it did not restrict corporate spending in state referenda) was what saved it. In fact, he recognized that the statute's under-inclusiveness was problematic. He then argued that this under-inclusiveness was not fatal because candidate elections are at the heart of political

debate and the state can choose to single out corporate spending in that context. *See id.* at 676-77, 110 S.Ct. 1391. He never suggested, however, that the state could not go further and limit corporate spending in referenda or ballot initiatives. Nor did he suggest that what distinguished *Austin* from *Bellotti* was that the latter involved referenda. To the contrary, he explained that *Bellotti* was different because it involved a complete ban on corporate spending, while *Austin* allowed for a segregated fund. *See id.* at 670 n. 1, 110 S.Ct. 1391 ("In [*MCFL*], we observed that the requirement that expenditures be made through PACs 'is of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in' *First National Bank of Boston v. Bellotti.*").

Justice Stevens did distinguish *Bellotti* from *Austin* on the ground that one involved referenda and the other involved candidate elections. *See id.* at 678, 110 S.Ct. 1391. But that is because he rejected *Buckley*'s conclusion that restrictions on campaign expenditures were not justified by the government's interest in preventing quid pro quo corruption. *See id.* Therefore, he did not need to rely on the government's new asserted interest – that corporate wealth distorts the electoral process. And because he relied on the traditional corruption rationale, he could make the same distinction the Court made in *Bellotti.* Justice Stevens' views are interesting, but because he was the sixth vote to uphold the statute, they shed little light on the majority's holding.

Finally, Judge Rymer argues that when a Supreme Court opinion directly applies to a case we must follow it even if the opinion's reasoning was undermined by a later Court decision. (Majority Op. at 1057). This is a

serious argument no doubt. *Bellotti* has not been overruled, and the facts of this case are similar to *Bellotti:* both involve restrictions on corporate spending in state referenda. The problem is that while the facts of the two cases are similar, there is also a significant difference. The Montana initiative – like the statute in *Austin* – allows for corporate spending through a segregated fund, while the *Bellotti* statute banned corporate spending entirely. Thus, to say we must follow the case that directly applies begs the question: which case applies when both share a common and important feature with the case before us? In such a situation, we should not simply assert that one case directly applies and then ignore the other. We must do our best to reconcile the two. And in my opinion, the best way to reconcile these cases is to acknowledge that *Austin* identified a new rationale for limiting corporate campaign spending that does not turn on whether candidate elections or ballot initiatives are at issue. In addition, the statute in *Austin* was less objectionable than the statute in *Bellotti* because it allowed for corporate spending through a segregated fund. Because the initiative also allows for a segregated fund, I think it is justified by Montana's asserted interest in eliminating what its people have determined to be distorting effects of corporate wealth on the electoral process.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

* * *

MONTANA MINING ASSOCIATION, ET AL.,
Plaintiffs,

-vs-

ED ARGENBRIGHT, ET AL.,
Defendants.

CV 98-37-H-CCL

ORDER

FILED SEP 18 1998

* * *

All plaintiffs through counsel seek hearing on their pending motions for preliminary injunction and also move the court for its order consolidating this case with *Montana Chamber of Commerce, et al v. Ed Argenbright* (CV 97-6-H-CCL) and alternatively request combining trial on the merits with hearing on the motions.

All counsel involved with *Montana Chambers* reportedly have been contacted. Mr. Motl and Mr. Scheier object, and Mr. Kaleczyc hasn't decided. Mr. Whyte, appearing here on behalf of defendant Cooney, has no objection.

Even before receiving this latest request, the court had prepared, in draft form, an order setting down the motions for preliminary injunction as the number two matter on October 13, 1998, behind case number one, *Montana Chamber,* suggesting to these parties plaintiff that they stipulate to combine trial on the merits with hearing on the motions for preliminary injunction (not an

uncommon procedure here), permitting the motions and hopefully the trial on merits to come on immediately for hearing upon conclusion of the first trial, with the court to decide neither matter until both had been fully heard, thus consolidating the cases to this limited extent. These cases cry out for some form of consolidation. The court's plan has the benefit of allowing all parties to be fully heard without causing interference in the presentation of either case by the other. It also benefits the court since it provides the court with all evidence in both cases before deciding either, and it provides some measures of judicial economy in the handling of the two cases. The drawback to this procedure is that it requires Mr. Motl and Mr. Scheier to prepare the discovery and prepare for a second trial on relatively short notice.

The court has been withholding this order waiting to hear from Colorado counsel in response to Mr. Motl's motion to intervene in this case which motion, of course, must be granted if any of these alternatives is to go forward.

Because plaintiffs are willing to combine their trial on the merits with hearing on the motions, the court is inclined to combine the same and to proceed with the limited consolidation described above, setting down the trial and hearing as the number two case on October 13, 1998.

As to the objection of Mr. Scheier and Mr. Motl, both should recognize that the court has jurisdiction and discretion to make this order *sua sponte*, and that some type of consolidation is the only reasonable way to proceed herein. It may be that they each will have to secure more

help to meet the increased workload that this will require over the next several weeks. This should be no problem for Mr. Scheier since the sovereign has abundant and talented resources who can or should be readily available. It may be burdensome for Mr. Motl but the court is confident that he will be able to rise to the occasion. I would also remind Messrs. Kaleczyc, Motl, and Scheier that I had their case set for trial in May and it would have been tried and decided then but for their requests for extension of time. They have had more than adequate time to prepare for the October 13, 1998, trial.

Accordingly,

IT IS ORDERED:

1. Plaintiffs' pending motions for preliminary injunction and trial on the merits are consolidated and the same is set down for hearing and trail as the number two case on October 13, 1998, before the undersigned sitting without a jury in the main courtroom U.S. courthouse, Helena, Montana. These matters will be heard immediately following *Montana Chamber of Commerce, et al. v. Ed Argenbright*, and the court will decide both cases after hearing all the evidence and argument in each.

2. The motion of Jonathan Motl to intervene herein on behalf of his client I-125 Proponents' Committee is hereby granted.

3. The parties shall forthwith meet, confer and submit a proposed discovery schedule to the court.

4. On or before September 30, 1998, the parties shall each provide to the undersigned written proposed findings of fact, conclusions of law and judgment, as

well as a trial brief outlining all issues, whether factual, legal, procedural or evidentiary, that are anticipated to arise at trial. The trial brief shall also include an exhibit list, witness list, and detailed objections, if any, to the exhibits proposed by opposing parties. The parties need not serve a copy of their trial briefs or proposed findings, conclusions, and judgment on opposing counsel, except that the parties shall serve a copy of their exhibit and witness lists and objections to exhibits on all other parties.

The clerk is directed forthwith to notify all parties herein and in CV 97-6-H-CCL of entry of this order and to file a machine copy hereof in CV 97-6-H-CCL.

Done and dated this 17 day of September, 1998.

/s/ Charles C. Lovell
CHARLES C. LOVELL
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA MINING ASSOCIATION, NORTHWEST MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, YELLOW BAND GOLD, INC., CONTINENTAL LIME, INC., GOLDEN SUNLIGHT MINES, INC.,

Plaintiffs,

-vs-

ED ARGENBRIGHT, in his official capacity as Montana Commissioner of Political Practices, MIKE COONEY, in his official capacity as Montana Secretary of State,

Defendants,

and LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND, AND CITIZENS FOR I-125,

Defendant-Intervenors.

Civil Docket
No. 98-37-H-CCL

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS

Heard in Courtroom No. 551
United States Courthouse
301 South Park
Helena, Montana
October 21 and 22, 1998

BEFORE THE HONORABLE CHARLES C. LOVELL

UNITED STATES DISTRICT JUDGE

* * *

COLLOQUY

[241] this compelling interest to demonstrate that there has been corruption.

In fact, Ms. Wright even said what did the voters say? They didn't want another layer of bureaucracy. They didn't want more taxes. I think that's a justified conclusion. I think the voters of Montana are perfectly capable of coming to such a conclusion, and apparently they did. Without filling in the gap, without saying what that corruption is, without some evidence of it, they have not demonstrated – not carried their burden, demonstrated compelling governmental interest.

Your Honor, defendants' case is long on emotion, long on feelings; totally devoid of evidence.

Thank you, Your Honor.

THE COURT: Thank you.

The matter then is deemed submitted to the court for decision.

Obviously, I can't list for you today all of the court's findings of fact and conclusions of law. I do intend,

however, to rule from the bench on the issues before the court and to enter written findings, conclusions, and judgment later explaining the reasons for the ruling.

Now, the two cases before the court for decision are Montana Chamber of Commerce against Argenbright, No. 97-6, and Montana Mining Association and others against [242] Argenbright, which is 98-37.

As to both cases, the court finds first that the court does have jurisdiction. Clearly, there is federal question jurisdiction here under Section 1331 of title 28 of the United States Code.

Secondly, the parties have standing.

Next, on the merits, the court finds that Initiative 125 is clearly a restriction on corporate speech and First Amendment rights.

Now, the question then is whether this is justified by any compelling interest of the State of Montana. The evidence does not show any actual corruption in the ballot issue election arena. There's evidence both ways as to the impact of corporate contributions. There was substantial evidence, and the court so finds, that the Montana system of issue balloting is healthy. There have been remarkable voter turnouts on issues in Montana elections which have been among the highest in the nation.

Court finds that there are many factors involved other than money alone, and the court is unwilling to draw the conclusion that defendants have asked the court to draw based on the evidence before it.

So there is a failure of proof of any justified compelling interest for the restrictions that are interposed under Initiative I-125.

[243] The impact, therefore, of I-125 is that the corporate voice is silenced and there's a chilling effect on corporate officers and directors.

Now, the United States Supreme Court has held that corporations do have First Amendment rights of speech, just as do natural persons. There may be many people who disagree with this proposition, but this is the law and it is the fundamental and basic rule to be applied in these cases. It's true that an initiative of the people of the State of Montana – this process is really a cherished process, but it has to yield to the requisites of the United States Constitution.

Court concludes that I-125 is an unjustified and unconstitutional infringement on corporate First Amendment rights, and accordingly, it is ordered, adjudged, and decreed that I-125 is unconstitutional and void, and the defendants are permanently enjoined from enforcing it.

Now, as to case No. 2, what does that do to I-137? The plaintiffs have asked the court to stop the election as to 137 and/or to stop the Secretary of State from counting the ballots. There hasn't been really any argument by either the plaintiffs or the defendants on this point. There really isn't any authority that's been submitted that would, in my view, warrant this action by the court.

It seems to me that if I-137 is as bad as the [244] plaintiffs claim it is and if their plight is as bad as they say it is, then they ought to have a remedy later. They're

not injured at this point, and who knows, they may be able to persuade the people that I-137 ought not be adopted.

If that's the case, then there is nothing for the courts to rule on. But it seems to me this issue is premature at this point, and the court therefore denies that request.

I want to thank the lawyers in both cases. I didn't dream that you could present the volume and the quality of evidence that's been brought forth here. It is surprising to me.

I also appreciate the way that you've cooperated with each other to get these cases before the court and get them decided. It is unusual that a case such as the mining case here can be filed one month, tried the next month, and decided that same month.

Court's adjourned.

(The proceedings in this matter were adjourned at 2:10 p.m.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA MINING ASSOCIATION, NORTHWEST MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, GOLDEN SUNLIGHT MINES, INC., YELLOW BAND GOLD, INC. and CONTINENTAL LIME, INC.,

Plaintiffs,

-v-

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices, and MIKE COONEY, in his official capacity as Montana Secretary of State,

Defendants,

and

I-125 PROPONENTS' COMMITTEE,

Defendant-Intervenor.

CV 98-37-H-CCL

ORDER

(Filed Nov. 13, 1998)

Upon the close of evidence on October 22, 1998, the court fully decided this case, ruling that I-125 was unconstitutional but denying Plaintiffs' all injunctive relief as to I-137. The court noted that a later opinion and order would fully set forth its findings of fact and explain its ruling.

Now, before entry of this opinion and order, Plaintiffs move herein to enjoin Montana from validating I-137 by

certifying the election results. The court has ruled; the motion is denied.

The Clerk is directed to notify forthwith the parties of entry of this order.

Done and dated this 13th day of November, 1998.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA CHAMBER OF COMMERCE, SLETTEN CONSTRUCTION COMPANY, LEHRKIND'S, INC., KALISPELL AREA CHAMBER OF COMMERCE, MONTANA HOSPITAL ASSOCIATION, MONTANA FARM BUREAU FEDERATION, MONTANA EDUCATION ASSOCIATION,

Plaintiffs,

-v-

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices,

Defendant,

and

I-125 PROPONENTS' COMMITTEE,

Defendant-Intervenor.

CV 97-6-H-CCL

MONTANA MINING ASSOCIATION, NORTHWEST MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, GOLDEN SUNLIGHT MINES, INC.,

CV 98-37-H-CCL

YELLOW BAND GOLD, INC. and
CONTINENTAL LIME, INC.,

Plaintiffs,

-v-

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices, and MIKE COONEY, in his official capacity as Montana Secretary of State,

Defendants,

and

I-125 PROPONENTS' COMMITTEE,

Defendant-Intervenor.

OPINION and ORDER

[Filed Nov. 20, 1998]

These two cases (hereinafter *Montana Chamber* and *Montana Mining Ass'n*, respectively) seek declaratory judgments and injunctive relief invalidating Initiative 125, and the *Montana Mining Ass'n* suit seeks similar relief as to Initiative 137. The court granted limited consolidation of the two cases by setting down serial trials with both cases to be tried before the court decided either, and with all agreeing that all evidence in the *Montana Chamber* case was also before the court in the *Montana Mining Ass'n* case. The cases came on regularly for trial on the merits on October 13 and October 21, 1998, respectively. In the case of *Montana Mining Ass'n*, a hearing on Plaintiffs' motions for preliminary injunction was merged with the trial.

The court has jurisdiction over both cases pursuant to 28 U.S.C. § 1331 (federal question). Having shown an invasion of a legally protected interest, a causal connection between the injury and the matter complained of, and a likelihood that the injury can be redressed by a favorable decision, *see Lee v. State of Oregon*, 107 F.3d 1382, 1387 (9th Cir. 1997), the Plaintiffs in both cases (with one exception) have standing to litigate their complaints. All parties in the *Montana Chamber* case agree that Plaintiff Montana Education Association ("MEA") no longer has standing and ought to be dismissed from the case because the MEA has disincorporated to avoid the restrictions imposed by Initiative 125.

After receiving the evidence in both trials and after considering the arguments of all the parties, the court ruled from the bench on October 22, 1998, finding in favor of the Plaintiffs in both cases as to the unconstitutionality of I-125 but denying the injunction against I-137 sought by the Plaintiffs in the *Montana Mining Ass'n* case. The following opinion explains the court's reasoning and also shall stand for the court's findings of fact and conclusions of law. Fed. R. Civ. P. 52(a).

Background

Since 1975, a total prohibition against all corporate contributions or payments to Montana ballot elections has been considered to be an overbroad, blanket infringement of corporations' First Amendment rights. *C & C Plywood Corp. v. Hanson*, 420 F. Supp. 1254 (D. Mont. 1976), *aff'd* 583 F.2d 421 (9th Cir. 1978). In *C & C Plywood*, the circuit panel began its review with the fundamental

proposition that political speech is "at the heart of the First Amendment's protection." *Id.* at 423 (*quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)). In affirming the district court's decision, the circuit panel also relied upon *Bellotti* for the rule that corporate speech is protected by the First Amendment unless a compelling state interest can be shown that justifies the abridgment. *Id.* at 423-25. The panel noted that corruption is not an issue in nonpartisan ballot issue elections (at least in the sense of *quid pro quo* corruption, which is generally defined as an attempt to buy political favors from candidates by individuals or corporations). *Id.* at 425. Thus, from 1975 until 1996 Montana corporations have been permitted to make contributions and expenditures to support or oppose ballot issues in Montana.

In 1996, however, Montana voters approved Initiative 125 ("I-125"), which amends Mont. Code Ann. § 13-35-227 and provides as follows:

> (1) (a) Except as provided in subsection (4), a corporation may not make a contribution or an expenditure in connection with a . . . ballot issue, or a political committee which supports or opposes a . . . ballot issue.
>
> (b) For purposes of this section, "corporation" refers to for-profit and nonprofit corporations.
>
> . . .
>
> (4) The provisions of subsection (1) prohibiting corporate contributions to or expenditures in connection with a ballot issue do not apply to a nonprofit corporation formed for the purpose, among others, of promoting political ideas, and that:
>
> (a) does not engage in business activities;

> (b) has no shareholders or other affiliated persons who have a private claim on the corporation's assets or earnings;
>
> (c) does not accept foreign or domestic for-profit corporations as members; and
>
> (d) does not accept in the aggregate more than 5% annually of its total revenue from foreign or domestic for-profit corporations.

The codification of I-125 was itself amended by the 55th Legislature by means of House Bill 575, effective April 17, 1997, which amendment deleted the exception regarding nonprofits (§13-35-227(4)) and expanded the class of entities affected by I-125 from corporations to include partnerships, associations, cooperatives, and other organizations. *See* Mont. Code Ann. § 13-35-236 (1997). On February 18, 1998, this court granted the *Montana Chamber* Plaintiff's summary judgment motion as to Count VI of their Amended Complaint, and in so doing declared that H.B. 575 was an unconstitutional and unenforceable abridgement of Plaintiffs' First Amendment freedoms of speech and association. This partial summary judgment decision left open the question whether I-125 itself violates the First Amendment and is therefore unconstitutional and unenforceable. This issue was set for trial to allow Plaintiffs to present their case and particularly to permit Defendants to present evidence to support their contentions that a compelling state interest justifies the speech restrictions imposed by I-125.

Evidence at Trial

Plaintiffs presented documentary evidence and witnesses, including Robert Brown, Robert Gannon, David Owen, Eric Feaver, Jerome Anderson, James Lopach, Herbert Alexander, Ed Argenbright, and Robert Moore.

Sen. Bob Brown, director of the campaign committee supporting Referendum 113, the Six Mills Levy University Funding Initiative, testified extensively regarding the manner in which I-125 hampered his ability to raise funds for R-113. Sen. Brown testified that many corporations, both for-profits and non-profits, were not contributing to this initiative campaign as they had in the past because of fear of running afoul of I-125, and that as a result the campaign committee lacked funds with which to educate Montanans about R-113.

Robert Gannon, Chairman of the Board, CEO, and President of Montana Power Company ("MPC"), testified persuasively regarding the inability of MPC to utilize its employee political action committee (the "MPC PAC") to respond to ballot initiatives that might threaten MPC's economic interests. Although no such ballot initiatives were qualified for the 1998 election cycle, three petitions were circulated that would have had major effects upon MPC's electric restructuring process. Mr. Gannon explained that little time is available to respond to a ballot initiative question, that he is the ultimate decision-maker regarding MPC's ballot initiative strategy, and that large amounts of money could be required to mount effective campaigns against ballot initiatives threatening MPC's interests. The MPC PAC is not an effective vehicle for this purpose, for the MPC PAC collects only about

$15,000 in funds each year (which funds are distributed to legislative candidates). The MPC PAC is controlled by a diverse committee of employees, and it therefore cannot make campaign strategy decisions as quickly as can a single individual such as the CEO of MPC. The MPC PAC therefore expresses the political positions of the employees who contribute to it; the MPC PAC does not, is not designed to, and really cannot express the political positions of MPC itself. (About half of MPC's shareholders are corporations who likewise are prohibited under I-125 according to Mr. Gannon.)

Mr. Gannon also testified that because of I-125 he was uncomfortable expressing his personal opinions in any public forum regarding a ballot issue such as R-113. Such public expressions of private sentiments might be misconstrued as a forbidden corporate in-kind contribution to the R-113 ballot issue campaign because, as President of MPC, Mr. Gannon is widely viewed as MPC's spokesperson, and he is compensated by MPC to express its views. Thus, Mr. Gannon's personal speech has been chilled in the context of ballot issue debates due to I-125.

David Owen, President of the Montana Chamber of Commerce, testified that his ability to perform his political duties as Chamber president has been all but extinguished. Most of the Montana Chamber of Commerce members are corporations; therefore a Chamber PAC would not be an effective vehicle to raise and manage ballot issue contributions and expenditures because the corporate Chamber members would be prevented from contributing to the PAC by I-125. Mr. Owen testified that he cannot travel around the state and speak to the membership of service clubs regarding ballot issues because

these audiences contain non-Chamber of Commerce members, making such travel and speaking arrangements a prohibited in-kind contribution to a ballot issue campaign. Neither can Mr. Owen be interviewed or participate in radio or television debates on ballot issues. Neither can Mr. Owen write editorials to express the political views of the Montana Chamber of Commerce regarding ballot issues, much less organize campaigns and coalitions to promote or fight ballot issues. The Montana Chamber is even reluctant to take official positions in its own newsletter for fear of communicating with non-members in violation of I-125. Like Mr. Gannon, Mr. Owen testified that his personal political speech about ballot issues has been chilled due to his concern that his speech might be attributed to the Chamber of Commerce, for which he is obviously a spokesperson.

Eric Feaver, the President of the Montana Education Association ("MEA") testified that the MBA relinquished its incorporated status in order to fight Constitutional Initiative 75 ("CI-75"), a ballot issue calling for a requirement that all taxes be put to a popular vote. Although the primary function of the MEA is to organize collective bargaining for its 10,000 members, the MEA also markets insurance and health care to its members, as well as conducting other miscellaneous business enterprises. In addition to its primary advocacy, the MEA engages in legislative lobbying and ballot issues campaigning. Although the MEA has created a PAC fund for ballot issues, and through that fund the MEA has raised over $30,000 for ballot issue campaigns, Mr. Feaver testified that the MEA was unable to raise through its PAC the amount of money it requires to fight CI-75. Because I-125

would have stifled MEA's right to political speech its corporate entity was dissolved to escape the prohibition.

Jerome Anderson, opposition campaign director for I-115 in 1990 and I-122 in 1996, testified that he does not believe that sheer dollars are the ultimate factor in an opposition campaign. Instead, Mr. Anderson believes that the defeat of other initiatives (I-115 and I-122) depended upon the development of credible, persuasive messages which were consistent with the values of a majority of voters. Mr. Anderson testified that I-125 has curtailed the free flow of information in ballot issue campaigns. As an example, he asserted that technical reports obtained from corporations for use as campaign literature in the I-122 opposition campaign could not be used after the passage of I-125 because they would be prohibited in-kind contributions to a ballot issue campaign. Mr. Anderson also noted that this was the quietest general election campaign season he can recall observing.

The testimony of Dr. James Lopach, professor of political science at the University of Montana, was particularly enlightening. Dr. Lopach has extensively studied Montana politics, electoral politics, voting behavior, and ballot elections. Dr. Lopach's expert opinion is that there is no corruption in the Montana political system. Not only is Dr. Lopach unaware of any actual corruption in Montana politics, but also he is unaware of any issue giving rise to the appearance of corruption in the eyes of the voters.

Dr. Lopach testified that Montana's political process is very healthy in that there is a proper degree of party competition, high voter turnouts, and low voter fall-off

on the ballot. Montana's voter turnout is approximately 15% higher than the national average. Voter falloff, which is defined as the failure of voters to vote from the top to the bottom of the ballot, is quite low, and in some instances voters have had a higher participation in ballot issues (at the bottom of the ballot) than in major candidate races, as in 1996 when 97.3% of the voters participated in the I-122 ballot but 97.1% of the voters participated in the governor's race.

Dr. Lopach testified that money is not the principal determinant of ballot issue campaigns. Dr. Lopach's opinion is that I-125 has had the negative effect of cutting off meaningful political speech. Although money is one factor influencing ballot issue campaigns, and media advertising is another, Dr. Lopach believes that political predisposition is primarily responsible for voting behavior. Thus, there is no credible evidence that corporate money is dominating citizen voices to the detriment of Montana's ballot initiative political process.

Dr. Lopach's testimony was echoed by Dr. Herbert Alexander, former director of the Citizens Research Foundation and professor emeritus of political science at the University of California, Berkeley. Dr. Alexander testified that neither money nor media advertising is the principal determinant of outcome in ballot issue elections. Dr. Alexander believes that Initiative 125 makes bad public policy because it removes a significant voice (i.e., that of corporations) which should be heard during ballot issue campaigns.

Secretary of State Mike Cooney, the State of Montana's Chief Election Officer, testified that there is no evidence of corruption in Montana politics in the form of buying or selling votes or tampering with election results. There is no evidence that corporate contributions or expenditures made in connection with ballot issues have reduced voter turnout or caused voter falloff on the ballot. Instead, the ballot issues in which the most money has been expended generally have had the highest voter participation.

Defendants likewise presented documentary evidence and witnesses, including Ed Argenbright, Joseph Kerwin, Dulcy Hubbert, Robert Shepard, Dennis Alexander, C.B. Pearson, Tony Jewett, Stan Frasier, John Deardourff, Mike Cooney, Samantha Sanchez, and William Chaloupka.

Dr. Robert Shepard, a Helena Physician who was one of the proponents of Initiative 115, testified regarding the difficulties the I-115 citizens' group faced in communicating their message regarding the I-115 tobacco tax. There is no doubt that Dr. Shepard was thoroughly disenchanted by the experience of campaigning against the campaign machine funded by out-of-state tobacco companies. Regrettably, Dr. Shepard testified that he will not work for another ballot issue campaign as a result of his experience with I-115. On cross-examination, Plaintiffs questioned Dr. Shepard whether proponents' failure to convince the voters to support I-115 might have been due in part to proponents' mistakes, questioning whether proponents' strategy might have been poorly planned,

whether proponents' political experience was insubstantial, and whether proponents' fund-raising techniques might have been inadequate.

The court also received testimony from Tony Jewett, executive director of the Montana Wildlife Federation, who testified regarding his experience in 1980 as a proponent of Initiative 87, a recycling initiative, and his involvement in Initiative 122, a clean water initiative. Mr. Jewett testified to feeling discouraged by his experiences with I-87 and I-122 because citizen proponents could not raise comparable funds to purchase media advertising as could their corporate opponents. Likewise, Mr. Stan Frasier testified to his experience as the Helena area captain of Initiative 122. From that experience, Mr. Frazier feels that citizens cannot win against corporate money in ballot issue campaigns.

John Deardourff testified regarding a survey taken by his polling firm which indicates that Montana citizens are displeased generally because of their perception of excessive corporate spending during ballot issue campaigns.

On direct examination by Defendant-Intervenor, Secretary of State Mike Cooney testified that he believes that corporate dollars are corrupting Montana's ballot initiatives and causing people to walk away from that political process. Secretary Cooney testified that I-125 brings reasonable limits to excessive spending, levels the playing field for citizens and corporations, and promotes an equal amount of communication from both sides. However, when questioned by Plaintiffs' counsel, Secretary Cooney

acknowledged that voter statistics do not show that Montanans are turning away from the ballot initiative process or elections in general.

Ms. Samantha Sanchez is the executive director of the National Institute on Money in State Politics. Ms. Sanchez claims to be an expert in the area of campaign contributions, and she studies the comparative rations of campaign contributions by analyzing contributions patterns, source, and quantity. Ms. Sanchez testified regarding contributions from out-of-state corporations in certain ballot issue elections compared to overall contributions and expenditures and compared to contributions and expenditures in other statewide and local elections.

Dr. William Chaloupka opined that (expensive) repetitive media advertising works and that political campaigns rely upon rhetoric and imagery, communicated by various media, to persuade voters to adopt a particular point of view. Dr. Chaloupka, a professor of political science at the University of Montana, has not specialized in the area of Montana ballot initiatives.

The court also received testimony from witness C.B. Pearson, a former executive director of Common Cause of Montana, and the campaign manager for Initiates 114, 118, and 125. Mr. Pearson is quite familiar with Montana's ballot initiative process, having personally participated in that process and having authored a monograph on the subject, "Big Money in Montana Ballot Campaigns (1982-1994)."

Mr. Pearson testified that he believes that the domination of corporate dollars is an abuse of the ballot initiative process and that corporate money discourages

citizens from proposing ballot issues. Specifically, Mr. Pearson testified that his analysis of Montana ballot issue elections shows that in nine initiatives wherein proponents were outspent by a 2/3 margin, seven of the nine initiatives (77%) were defeated. On cross-examination, Plaintiffs showed that when all ballot initiatives are considered wherein one side outspend the other side by a 2/3 margin, the side outspending won ten times and lost nine times.

Discussion

Having considered all the evidence submitted by the parties, the court finds Plaintiffs' evidence to be credible and persuasive. The court accepts the expert testimony provided by Dr. Lopach, who asserted there is no corruption or appearance of corruption in Montana ballot issue elections and that this Montana political process is healthy and of sound integrity. The court accepts the testimony of both Drs. Lopach and Alexander that many factors influence election outcome, particularly the political values, predispositions, and party loyalty of the voters, and that neither money nor media advertising is the sole or even the single most important variable controlling election outcomes. The court accepts the testimony of Plaintiffs' witnesses that Initiative 125 deprives corporations of the ability to communicate their political views during ballot issue campaigns.

The court finds the defense witnesses who testified regarding their participation in ballot issue campaigns to be sincerely motivated and public-spirited persons. Some

of these witnesses appear to have had unfortunate experiences by being involved in issue campaigns in which their sides lost and the other side had a disproportionate amount of funds. Apparently these witnesses have made the leap in logic that they lost solely because of the opposing side's funds, which the court considers to be an unwarranted but all too human conclusion. The collective sincerity of these witnesses inclines the court to a sympathetic view of their testimony, but they simply have not proven their contention by a preponderance of the evidence.

Of course money can and does have a potential effect on the outcome of elections. It is one of many factors. Multiple variables other than money and media influence election outcomes Montana ballot issue elections are not corrupted by the political expressions of corporations. The ballot issue process in Montana is health and not corrupt. Montana has no compelling state interest which would justify the abridgement of First Amendment rights imposed by Initiative 125.

The court concludes first and foremost, that Initiative 125, perhaps facially and certainly as applied, infringes upon the First Amendment rights of speech and association of the Plaintiffs and others subject to the prohibitions contained therein. Initiative 125 is not narrowly tailored to address only the campaign contributions and expenditures of large corporations. The reported aim of its drafters was to catch the big fish – shut off the large campaign warchests. But the net cast by Initiative 125 arguably also catches tens of thousands of little fish, individual Montanans who have banded together to enhance their political speech through organizations such

as the Montana Education Association, the Montana Stockgrowers Association, the Montana Wool Growers Association, the Montana Chamber of Commerce, the Montana Farm Bureau, the Montana Hospital Association, the Montana Medical Association, the Montana Taxpayers' Association, and others.

"A major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S 214, 218 (1966). The First Amendment therefore protects political expression, and in so doing "serves significant societal interests" and "often protects interests broader than those of the party seeking their vindication. . . . " *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 766 (1978). Thus, the proper question is whether a particular type of expression deserves First Amendment protection. *Id.*

Requiring corporations to fund ballot issue campaign speech through separate, segregated funds (consisting of voluntary contributions from employees, officers, directors, and shareholders), as is required by Initiative 125, deprives corporations of their ability to communicate political ideas directly to the electorate. The corporate voice is silenced. Initiative 125 chills impermissibly the speech and association rights of corporations and their officers and employees. Initiative 125 precludes corporations from directly resisting potential laws that could put them out of business. Requiring shareholders to fight the corporation's battles is an ineffective and illegal substitution for corporate speech rights. Perhaps almost as important, Initiative 125 prevents the electorate from being exposed to diverse viewpoints on public policy issues.

The State of Montana, which is represented by Defendant and Defendant-Intervenor, must show a compelling state interest to justify a significant infringement of core First Amendment rights. *Colorado Repub. Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 609 (1996). Leveling the playing field by equalizing the strength of citizen speech relative to corporate speech is inconsistent with First Amendment purposes and principles. *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). To accomplish the necessary showing, the State must demonstrate the existence or appearance of corruption, which the court defines to include real harm to the integrity of Montana's ballot initiative process. Real harm does not include "wasteful and excessive campaign spending." *Colorado Republican Federal Campaign Committee*, 518 U.S. at 617. While it may be conceivable that corporations could overwhelm the political speech of individual citizens in a particular case to such a degree that the integrity of the ballot initiative process itself is damages, *see Austin v. Michigan Chamber of Commerce*, 494 U.S 652, 661 (1990), the meager anecdotal evidence presented by the Defendants wholly fails to prove that such has occurred in Montana. The State has failed to show that corporate contributions or expenditures in ballot initiate campaigns have had any adverse effect on the integrity of Montana's political process. Specifically, the State has failed to produce evidence that would support a judicial finding that corporate wealth has dominated citizen voices to the detriment of the ballot initiative process.

Corporations are therefore entitled to defend their economic interests by resorting to the corporate treasury to fund their participation in ballot initiative campaigns.

Like individuals, unions, and associations, corporations are entitled to attempt to shift public opinion and voting behavior to favor the corporate point of view, and in fact this is the primary purpose of all political speech, *see Bellotti*, 435 U.S. at 790. It is up to the voters to determine whether they approve or disapprove of a corporation's point of view. The purpose of the First Amendment is to allow "each person [to] decide for him or herself the ideas and beliefs deserving of expression, consideration and adherence." *Turner Broadcasting System, Inc. v. Federal Communication Commission*, 512 U.S. 622, 641 (1994).

The popular sentiment among Montana voters may be that there is too much corporate money influencing ballot issue campaigns and also that it is exceedingly difficult for ordinary citizens to participate successfully in some ballot issue campaigns. However, the law of the United States is that political speech is protected by the First Amendment, and this rule of law benefits all Montanans. The court is sensitive to the complaint that I-125 represents the will of the people. As a matter of law, however, it is simply not relevant that Initiative 125 was enacted by the voters rather than the legislature, "because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981).

In order to promote open and informed discussion of public affairs, the First Amendment seeks to "protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995). Under the law of the United States, that protection is

granted to political speech without regard to its source, whether individual, corporation, union, or other association. Freedom of speech regarding public affairs is one of the cornerstones of self-government. "And self-government suffers when those in power suppress competing views on public issues 'from diverse and antagonistic sources.' " *New York Times Co. v. Sullivan*, 376 U.S 254, 266 (1964) (*quoting Associated Press v. United State*, 326 U.S. 1, 20 (1945)).

Accordingly,

IT IS HEREBY DECLARED that Initiative 125 is unconstitutional and therefore null and void, with no legal force or effect. The State of Montana is directed to cease its enforcement of the provisions of Initiative 125. Judgment shall be entered in Plaintiffs' favor in both *Montana Chamber* and *Montana Mining Ass'n*, although in the latter case the court denies the Plaintiffs' preliminary injunction notion as to Initiative 137 because the relief sought was premature as of the close of evidence.

Each party shall bear its own fees and costs.

IT IS FURTHER ORDERED that the complaint in *Montana Chamber* is DISMISSED as to Montana Education Association for its lack of standing to sue.

The Clerk is directed forthwith to notify the parties of entry of this order.

Done and dated this 20th day of November, 1998.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MONTANA CHAMBER OF COMMERCE; SLETTEN CONSTRUCTION; LEHRKIND'S INC.; KALISPELL AREA CHAMBER OF COMMERCE; MONTANA HOSPITAL ASSOCIATION; MONTANA FARM BUREAU; MONTANA EDUCATION ASSOCIATION, Plaintiffs-Appellees, vs. ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices, Defendant, and LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR 1-125, Defendant-Intervenor-Appellant.	No. 98-36256 D.C. No. CV-97-00006-CCL ORDER FILED FEB 20 2001
MONTANA MINING ASSOCIATION; NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; GOLDEN	No. 98-36257 D.C. No. CV-98-00037-CCL

SUNLIGHT MINES, INC., YELLOW BAND BOLD, INC., CONTINENTAL LIME, INC.,

Plaintiffs-Appellees,

vs.

ED ARGENBRIGHT; MIKE COONEY,

Defendants,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS 1-125,

Defendant-Intervenor-Appellant.

MONTANA MINING ASSOCIATION; NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; GOLDEN SUNLIGHT MINES, INC.; YELLOW BAND GOLD, INC.; CONTINENTAL LIME, INC.,

Plaintiff-Appellees,

vs.

ED ARGENBRIGHT

Defendant-Appellant,

and

No. 98-36261

D.C. No. CV-98-00037-CCL

MIKE COONEY,

Defendant,

and

LEAGUE OF WOMEN NOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR I-125,

Defendant-Intervenor,

MONTANA CHAMBER OF COMMERCE; SLETTEN CONSTRUCTION; LEHRKIND'S INC.; KALISPELL AREA CHAMBER OF COMMERCE; MONTANA HOSPITAL ASSOCIATION; MONTANA FARM BUREAU; MONTANA EDUCATION ASSOCIATION,

Plaintiffs-Appellees,

vs.

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices,

Defendant-Appellant,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG

No. 98-36266

D.C. No. 97-00006-CCL

2030 FUND AND CITIZENS FOR I-125,

Defendant-Intervenor.

MONTANA MINING ASSOCIATION,

Plaintiff,

and

NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; CONTINENTAL LIME, INC.,

Plaintiffs-Appellants,

vs.

ED ARGENBRIGHT; MIKE COONEY,

Defendants-Appellees,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR I-125,

Intervenor-Appellee.

No. 99-35032

D.C. No. CV-98-00037-CCL

MONTANA MINING ASSOCIATION,

Plaintiff,

and

No. 99-35033

D.C. No. CV-97-00037-CCL

NORTHWEST MINING ASSOCIATION; COMMUNITIES FOR A GREAT NORTHWEST; CONTINENTAL LIME, INC.,

Plaintiffs-Appellees,

vs.

ED ARGENBRIGHT,

Defendant,

and

MIKE COONEY,

Defendant-Appellant.

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND AND CITIZENS FOR I-125,

Intervenor.

Before: RYMER, HAWKINS, and McKEOWN, Circuit Judges.

A majority of the panel has voted to deny the petition for rehearing and petition for rehearing en banc. Judge Hawkins voted to grant the petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc. An active judge called for an en banc vote, and a majority of the active judges of the court has

voted to deny the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and petition for rehearing en banc are DENIED.

Mont. Code Ann. § 13-35-227. Prohibited contributions from corporations

(1) (a) Except as provided in subsection (4), a corporation may not make a contribution or an expenditure in connection with a candidate, a ballot issue, or a political committee that supports or opposes a candidate, a ballot issue, or a political party.

(b) For purposes of this section, "corporation" refers to for-profit and nonprofit corporations.

(2) A person, candidate, or political committee may not accept or receive a corporate contribution described in subsection (1).

(3) This section does not prohibit the establishment or administration of a separate, segregated fund to be used for making political contributions or expenditures if the fund consists only of voluntary contributions solicited from an individual who is a shareholder, employee, or member of the corporation.

(4) The provisions of subsection (1) prohibiting corporate contributions to or expenditures in connection with a ballot issue do not apply to a nonprofit corporation formed for the purpose, among others, of promoting political ideas and that:

(a) does not engage in business activities;

(b) has no shareholders or other affiliated persons who have a private claim on the corporation's assets or earnings;

(c) does not accept foreign or domestic for-profit corporations as members; and

(d) does not accept in the aggregate more than 5% annually of its total revenue from foreign or domestic for-profit corporations.

(5) A person who violates this section is subject to the civil penalty provisions of 13-37-128.

Mont. Code Ann. § 13-37-128. Cause of action created

(1) A person who intentionally or negligently violates any of the reporting provisions of this chapter is liable in a civil action brought by the commissioner or a county attorney pursuant to the provisions outlined in 13-37-124 and 13-37-125 for an amount up to $500 or three times the amount of the unlawful contributions or expenditures, whichever is greater.

(2) A person who makes or receives a contribution or expenditure in violation of 13-35-225, 13-35-227, 13-35-228, or this chapter is liable in a civil action brought by the commissioner or a county attorney pursuant to the provisions outlined in 13-37-124 and 13-37-125 for an amount up to $500 or three times the amount of the unlawful contribution or expenditure, whichever is greater.

Mont. Code Ann. § 82-4-390. Cyanide heap and vat leach open-pit gold and silver **mining** prohibited

(1) Open-pit **mining** for gold or silver using heap leaching or vat leaching with **cyanide** ore-processing reagents is prohibited except as described in subsection (2).

(2) A mine described in this section operating on November 3, 1998, may continue operating under its existing operating permit or any amended permit that is necessary for the continued operation of the mine.

Fed. R. Civ. Pro. Rule 52. Findings by the Court; Judgment on Partial Findings

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in subdivision (c) for this rule.

* * *

Fed. R. Evid. Rule 201. Judicial Notice of Adjudicative Facts

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice of requested by a party and supplied with the necessary information.

* * *

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA MINING ASSOCIATION, NORTHWEST MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, GOLDEN SUNLIGHT MINES, INC., YELLOW BAND GOLD, INC. AND CONTINENTAL LIME, INC., Plaintiffs, v.	CV 98-37-H-CCL COMPLAINT FOR DECLARATORY RELIEF (Filed Sep-1 1996)

ED ARGENBRIGHT, in his official capacity as Montana Commissioner of Political Practices, MIKE COONEY, in his official capacity as Montana Secretary of State,

Defendants.

NOW COME the Plaintiffs, by and through their respective counsel, and seek an order of declaratory judgment pursuant to 28 U.S.C. § 2201-02, finding that § 13-35-227, MCA, (as amended by Montana Initiative I-125 and modified by a subsequent order of this Court) is unconstitutional as applied to Plaintiffs in that it impermissibly restricts their First Amendment rights of free speech and freedom of association with respect to Plaintiffs' desire to oppose Montana Ballot Initiative I-137, an initiative currently certified and on the ballot for the November 1998 general election.

JURISDICTION & VENUE

1. This Court has jurisdiction over this matter pursuant to Article III of the United States Constitution and 28 U.S.C. § 1331, as it is a civil action arising under the Constitution and Laws of the United States. Venue is appropriate under 28 U.S.C. § 1391(b) and local rule 105-3 because defendants both may be found within this Division of this District.

PLAINTIFFS

2. Some Plaintiffs are for-profit mining corporations, some of which now utilize or seek to utilize the cyanide leach process to extract gold, silver and other valuable

minerals from mined ore in the State of Montana. Others are not-for-profit associations (representing for-profit corporations and individuals) transacting business in Montana.

A. The Montana Mining Association

3. Plaintiff, the Montana Mining Association ("MMA") is a not-for-profit corporation organized under the Montana Nonprofit Corporation Act, Title 35, Part 2, Montana Code Annotated, with its principal office in Helena, Montana.

4. The members of the MMA include for-profit mining corporations, individuals, and for-profit corporations and individuals that serve the Montana mining industry. Some its members utilize the cyanide leach process to mine metallic ore.

5. The MMA receives more than 5% of its income from for-profit corporations. Accordingly, it is barred under Montana campaign laws from making direct contributions to political committees or making direct expenditures in opposition to I-137.

6. The MMA wishes to make direct contributions to political committees and/or make direct expenditures in opposition to I-137.

B. The Northwest Mining Association

7. The Northwest Mining Association ("NWMA") is a not-for-profit trade association incorporated under the laws of the State of Washington.

8. The members of the NWMA include for-profit mining corporations, individuals and for-profit corporations and individuals that serve the mining industry.

9. Its members include entities that are incorporated, are authorized to do business, or are citizens of Montana. Some of its members use the cyanide leach process to mine and recover metallic ores and minerals.

10. The NWMA receives more than 5% of its annual revenue from for-profit corporations. Accordingly, it is barred under Montana campaign laws from making direct contributions to political committees or making direct expenditures in opposition to I-137.

11. The NWMA wishes to make direct contributions to political committees and/or make direct expenditures in opposition to I-137.

C. Communities For a Great Northwest

12. Communities For a Great Northwest, Ltd ("CGN") is a non-for-profit corporation organized under the laws of the State of Montana and recognized as a 501(c)(3) organization by the United States Internal Revenue Service.

13. CGN's members include family owned and operated corporations and individual employees of small, family owned corporations and employees of larger corporations.

14. CGN's members could bring suit in their own right, but have exercised their constitutional rights to associate together and pool their resources under their association.

15. CGN was organized to educate its members and the general public regarding issues affecting natural resource dependent industries such as mining, logging, farming and ranching.

16. CGN receives more than 5% of its annual revenue from for-profit corporations. Accordingly it is barred under Montana campaign laws from making direct contributions to political committees or making direct expenditures in opposition to I-137.

17. CGN wishes to make direct contributions to political committees and/or make direct expenditures in opposition to I-137.

D. Golden Sunlight Mines, Inc.

18. Plaintiff, Golden Sunlight Mines, Inc., ("Golden Sunlight") is a for-profit mining corporation incorporated in California and authorized to do business in Montana. Golden Sunlight has facilities and operations in Whitehall, Montana.

19. Golden Sunlight has operated its Whitehall mine since 1982. Golden Sunlight utilizes the cyanide leach process to extract gold, silver and other valuable minerals from the ore it mines at the Whitehall facility.

20. Since it began operations at Whitehall, Golden Sunlight's mining permit has been amended ten times. Its most recent permit amendment was granted by the State of Montana in July 1998.

21. Golden Sunlight anticipates that it will locate further gold deposits in (or near) its present operations. Accordingly, it believes it will seek an eleventh permit amendment to mine ore utilizing the cyanide leach process.

22. If I-137 passes, Golden Sunlight will be prohibited from obtaining any further permits for mining.

23. The blanket prohibition against future mine expansion would result in loss of capital investment in the Whitehall mine, and loss of the opportunity to recover return on the capital investment.

Golden Sunlight's Tenth Permit Amendment

24. In July, 1998, Golden Sunlight received a permit amendment allowing expansion of the mine. This expansion will provide for mine operations for seven additional years.

25. The Montana Environmental Information Center ("MEIC"), a proponent of I-137, has indicated an intent to challenge the July, 1998 permit.

26. If MEIC's challenge is successful and the permit is revoked, and if I-137 passes, Golden Sunlight would be prohibited from subsequent reconsideration of this permit which incorporates the cyanide leach process.

27. In that event, the mine would be shut down and capital investment by Golden Sunlight would be lost along with the opportunity to further realize a return on the capital investment in the Whitehall mine.

28. Golden Sunlight is a for-profit corporation. Accordingly, it is barred under Montana campaign laws from

making direct contributions to political committees and/or making direct expenditures in opposition to I-137.

29. Golden Sunlight wishes to make direct contributions to political committees that oppose I-137 and/or wishes to make direct expenditures in opposition to I-137.

E. Yellow Band Gold, Inc.

30. Yellow Band Gold, Inc. ("Yellow Band Gold") is a Montana corporation organized under the Montana Business Corporation Act, § 35-1-112, et seq., MCA.

31. Yellow Band Gold is in the business of developing and operating a small gold mining property in Beaverhead County, Montana.

32. Yellow Band Gold is applying for, but has not yet obtained, a permit to mine gold at its operation utilizing the cyanide leach process.

33. If I-137 passes, Yellow Band Gold will not be able to obtain a permit to mine gold at its operation utilizing the cyanide leach process.

34. Yellow Band Gold is a for-profit corporation. Accordingly, it is barred under Montana campaign laws from making direct contributions to political committees and/or making direct expenditures in opposition to I-137.

35. Yellow Band Gold would like to make expenditures in opposition to I-137 and/or contribute to political committees opposing I-137.

F. Continental Lines, Inc.

36. Plaintiff Continental Lime, Inc., ("Continental Lime") is a Utah corporation authorized to do business in Montana under the Montana Business Corporation Act, § 35-1-112, et seq., MCA.

37. Continental Lime is in the business of producing high quality calcium quicklime and hydrated lime for, among other uses, by the Montana mining industry to control acid rock drainage.

38. Continental Lime is a for-profit corporation. Accordingly, it is barred under Montana campaign laws from making direct contributions to political committees and/or making direct expenditures in opposition to I-137.

39. Continental Lime would like to make expenditures in opposition to I-137 and/or make contributions to political committees in opposition to I-137.

DEFENDANTS

40. Pursuant to § 13-37-111, MCA, Defendant, Ed Argenbright, in his official capacity as Montana Commissioner of Political Practices ("Commissioner"), is charged by Montana law with the responsibility of investigating complaints and enforcing Montana's campaign and election laws.

41. Pursuant to § 13-1-201, MCA, Defendant, Mike Cooney, in his official capacity as Montana Secretary of State ("Secretary"), is the chief election officer of the State of Montana. He is, by law, charged with the responsibility

of administering the statewide ballot election process. *See* § 13-27-501, *et seq.*, MCA.

THE I-137 INITIATIVE

42. Montana Ballot Initiative I-137 ("I-137") was certified to the Governor of Montana on July 17, 1998 for submission to the Montana voters on the November 3, 1998 ballot. If passed, I-137 would prohibit the State of Montana, from the date of its passage, from issuing mining permits to mining companies or individuals that would incorporate the use of the cyanide leach process in their mining operations. (See attached text of I-137 as Ex. A).

43. The cyanide leach process is a widely accepted and long used method of extracting metals from low grade metallic ore.

44. If I-137 passes, the prohibition of future use of this process would have a direct impact on Plaintiffs, the economy of the State of Montana and the future of the mining industry in Montana.

MONTANA CAMPAIGN FINANCE LAW

45. Section 13-35-227, MCA, as it now exists (subsequent to this Court's Order of Partial Summary Judgment dated February 18, 1998 in Cause No. CV 97-6-H-CCL) prohibits for-profit corporations and certain not-for-profit corporations from directly contributing funds to a campaign committee supporting or opposing a ballot issue, or from making a direct expenditure for or against a ballot issue.

46. Section 13-35-227, MCA, was amended in 1996 by I-125, then by the 1997 Montana Legislature (HB 575). It now reads, subsequent to this Court's Order of Partial Summary Judgment in the above referenced cause (**hereinafter referred to as** "I-125"):

> § 13-35-227. **Prohibited Contributions from Corporations.**
>
> (1) (a) Except as provided in subsection (4), a corporation may not make a contribution or an expenditure in connection with a candidate, a ballot issue, or a political committee which supports or opposes a candidate, a ballot issue, or a political party.
>
> (b) For purposes of this section, "corporation" refers to for-profit and nonprofit corporations.
>
> (2) A person, candidate, or political committee may not accept or receive a corporate contribution described in subsection (1).
>
> (3) This section does not prohibit the establishment or administration of a separate, segregated fund to be used for making political contributions or expenditures if the fund consists only of voluntary contributions solicited from an individual who is a shareholder, an employee, or a member of the corporation.
>
> (4) The provisions of subsection (1) prohibiting corporate contributions to or expenditures in connection with a ballot issue do not apply to a nonprofit corporation formed for the purpose, among others, of promoting political ideas and that:
>
> (a) does not engage in business activities;

(b) has no shareholders or other affiliated persons who have a private claim on the corporation's assets or earnings;

(c) does not accept foreign or domestic for profit corporations as members; and

(d) does not accept in the aggregate more than 5% annually of its total revenue from foreign or domestic for profit corporations.

§ 13-35-227, MCA.

47. Defendant Commissioner has stated that he will enforce I-125 against for-profit corporations or not-for-profit corporations (such as Plaintiffs) if they, or other business entities or organizations similarly situated to them contribute directly to a campaign committee opposing or supporting a ballot issue or directly make an expenditure for or against a ballot issue. (*See* attached letter from Commissioner Argenbright as Ex. B).

COUNT I

FREEDOM OF SPEECH, EXPRESSION AND ASSOCIATION

48. Plaintiffs reallege, and incorporate as though fully set forth herein paragraphs 1-47 of this Complaint.

49. The Plaintiffs, and their respective for-profit and not-for-profit members have a constitutionally protected right to engage in political speech and association and to make contributions and expenditures in support of or in opposition to ballot issues.

50. The degree of protection afforded to the Plaintiffs constitutionally protected rights of free speech and association is heightened when their assets and way of life are threatened, as they are by the proposed initiative.

51. The threatened enforcement of the civil penalties for violating I-125, forces Plaintiffs to choose between either engaging in their rights of free speech and association to protect their economic interests (thus facing civil enforcement proceedings against them) or foregoing the exercise of those rights to avoid such enforcement proceedings and risk the loss of assets and a way of life.

52. I-125 impermissibly chills the Plaintiffs' rights to engage in political speech and association.

53. I-125, therefore, abridges the First Amendment rights of the Plaintiffs and their respective for-profit and not-for-profit corporate members.

WHEREFORE, Plaintiffs request relief as follows:

1) That the Court order such preliminary injunctive relief as may be requested by separate application therefore;

2) That the Court issue a declaratory judgment ruling and order which declares I-125 to be a violation of the United States Constitution's First Amendment right to free speech as applied to Plaintiffs or other persons, corporations or associations similarly situated, together with a permanent injunction against enforcement of I-125; and

3) That the Court provide such other and further relief as this Court deems proper under the circumstances.

Respectfully submitted this 1st day of September, 1998.

GOUGH, SHANAHAN, JOHNSON & WATERMAN

/s/ Alan Joscelyn
One of the Attorneys for Plaintiffs Golden Sunlight Mines, Inc.

MOUNTAIN STATES LEGAL FOUNDATION

/s/ J. Scott Detamore
One of the Attorneys for Plaintiffs the Montana Mining Association, Northwest Mining Association, Communities for a Great Northwest, Ltd. Yellow Band Gold, Inc. and Continental Lime, Inc.

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/s/ Dale R. Coebrell
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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA MINING ASSOCIATION, et. al., Plaintiffs, v. ED ARGENBRIGHT, et al., Defendants	Civil Action No. CV 98-37-H-CCL **MOTION FOR PRELIMINARY INJUNCTION** FILED SEP 4 1998

Plaintiffs, Montana Mining Association (MMA), Northwest Mining Association (NWMA), Communities for a Great Northwest (CGN), Yellow Band Gold, Inc.,

and Continental Lime, Inc., through their attorneys, move this court for a preliminary injunction as set forth more fully in the *ad damnum* clause hereof, and as cause therefore show this court as follows:

1. Plaintiffs are corporations which are prevented by § 13-25-227, MCA, Montana ballot initiative I-125 (I-125), from making expenditures to educate the public concerning Montana ballot initiative I-137 (I-137), dealing with cyanide heap leaching, which will be on the statewide ballot in the November 1998 general election.

2. If I-137 is passed, Plaintiffs will suffer irreparable harm, as more fully set forth in these Plaintiffs' Brief, attached hereto and incorporated herein in full by reference.

3. I-125, as it applies to restrict Plaintiffs from participating in the public debate or making expenditures in connection with I-137 constitutes an unconstitutional burden on the freedom of speech and of association of Plaintiffs as guaranteed to Plaintiffs by the First Amendment to the U.S. Constitution and applied to the states by the Fourteenth Amendment.

4. Defendants cannot enunciate a compelling state interest justifying the limitations on Plaintiffs' speech and associational rights, and if they could, which is denied, I-125 is not a narrowly tailored remedy designed to accomplish the identified interest.

5. Plaintiffs will be irreparably damaged if the relief prayed for herein is not granted.

6. Plaintiffs have no adequate remedy at law.

7. Plaintiffs are likely to prevail on the merits of this case.

8. The balance of hardships favors Plaintiffs over Defendants.

9. Plaintiffs join in the Motion for Preliminary Injunction filed herein by Golden Sunlight Mines, and the Brief in Support thereof, and incorporate the same by reference, including the Affidavits or Declarations filed in support thereof.

10. Plaintiffs incorporate, in support of this Motion, their Brief attached hereto, and the Declarations of Jill Andrews, Laura Skaer, and Bruce Vincent, E.E. Gene Nelson and Elton Chorney, attached thereto.

WHEREFORE, Plaintiffs pray for an Order granting a Preliminary Injunction against the Defendants enjoining them and each of them as follows:

a. From enforcing the provision of I-125 against Plaintiffs or any other similarly situated corporate party, to prevent expenditures or other participation in the public debate and discussion of or concerning I-137; and/or

b. From conducting the vote on I-137 on the November 1998 statewide ballot, and ordering that the vote on said initiative be delayed until such time as this court issues a declaratory judgment ruling on the issue concerning whether I-125 violates Plaintiffs' constitutional rights and should be permanently enjoined with respect to I-137.

MOUNTAIN STATES LEGAL FOUNDATION

by /s/ J. Scott Detamore
William Perry Pendley
J. Scott Detamore
William Perry Pendley

Attorneys for Plaintiffs, MMA, NWM, CGN, Yellow Band Gold, Inc., and Continental Lime, Inc.

CERTIFICATE OF SERVICE BY MAIL

The undersigned certifies that he/she served a copy of the foregoing by facsimile transmission and by placing the same in the United States Mails, postage prepaid, properly addressed to the following, on the 4th day of September, 1998:

Ed Argenbright
Commissioner of Political Practices

Jim Scheier, Attorney for Ed Argenbright
Agency Legal Services Bureau

MOTION FOR PRELIMINARY INJUNCTION

[215] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA HELENA DIVISION

MONTANA CHAMBER OF COMMERCE, SLETTEN CONSTRUCTION COMPANY, LEHRKIND'S, INC., KALISPELL AREA CHAMBER OF COMMERCE, MONTANA HOSPITAL ASSOCIATION, MONTANA FARM BUREAU FEDERATION, MONTANA EDUCATION ASSOCIATION,

Plaintiffs,

-vs-

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices,

Defendant,

and

I-125 PROPONENTS' COMMITTEE,

Defendant-Intervenor.

Civil Docket No. 97-6-H-CCL

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS

Heard in Courtroom No. 551
United States Courthouse
301 South Park
Helena, Montana

October 14, 1998

9:17 a.m.

BEFORE THE HONORABLE CHARLES C. LOVELL

UNITED STATES DISTRICT JUDGE

Volume 2 of ___

[216] APPEARANCES:

PRESENT ON BEHALF OF THE PLAINTIFFS, MONTANA CHAMBER OF COMMERCE, SLETTEN CONSTRUCTION COMPANY, LEHRKIND'S INC., KALISPELL AREA CHAMBER OF COMMERCE, MONTANA HOSPITAL ASSOCIATION, MONTANA FARM BUREAU FEDERATION,

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[217] COLLOQUY

The following proceedings were had:

MORNING SESSION

Wednesday, October 14, 1998
Beginning at 9:17 a.m.

THE COURT: Be seated, please. Good morning.

We're ready for the second day of trial in Civil 97-6.

Counsel are present. We're ready for your next witness, Mr. Kaleczyc.

MR. KALECZYC: Thank you, Your Honor. Call Mr. Jerome Anderson.

JEROME ANDERSON, having been called as a witness on behalf of the plaintiffs, being first duly sworn according to law, was examined and testified as follows:

CLERK OF COURT: Please state your name and spell it.

THE WITNESS: Jerome Anderson.

CLERK OF COURT: Could you spell your first name?

THE WITNESS: J-E-R-O-M-E.

CLERK OF COURT: Is that Anderson with a S-O-N or S-E-N?

[218] ANDERSON/DIRECT BY KALECZYC

THE WITNESS: Yes, ma'am. S-O-N.

CLERK OF COURT: Thank you. You may be seated.

DIRECT EXAMINATION

BY MR. KALECZYC:

Q Good morning, Mr. Anderson.

A Good morning, sir.

Q Would you tell the court your occupation, please.

A I'm an attorney at law.

Q And where do you practice law?

A Helena, Montana.

Q And generally describe to the court the nature of your law practice.

A At the present time, I represent clients at the legislative process before the Montana legislature. I do administrative law practice for clients here in Helena.

State government. Very little amount of litigation. Some business legal work.

In the past, I've done a great deal of litigation, labor law, a great deal of corporate business work.

Q And how long have you been engaged in the practice of law?

A Just over 50 years.

Q And did you practice in another city besides Helena?

A Billings, Montana for 40 years.

[219] ANDERSON/DIRECT BY KALECZYC

Q I'm sorry. How long?

A Billings, Montana for 40 years.

Q Have you ever been elected to public office?

A I served four sessions of the Montana legislature in the House eight years.

Q And did you hold any leadership positions while you were in the legislature?

A I was majority floor leader during one session. I was floor whip during several sessions.

Q Have you ever held any political offices?

A Yes. I've – I guess, run the gamut from precinct committee man to various levels of offices at a county level, including county chairman. I was legal counsel to one of the major parties here in Montana on a statewide

basis. I was vice chairman of the Republican Party for a period of time. Things of that nature.

Q Have you ever been involved with ballot issues?

A Yes. In two campaigns directly. In 1990, I was chairman and manager of the campaign against I-115; and in 1996, I held the same position in connection with the I-122 campaign.

Q Can you briefly describe for the court what are the responsibilities of a campaign manager in a ballot issue campaign?

A Well, you have the full responsibility for –

[220] ANDERSON/DIRECT BY KALECZYC

Q Excuse me, Mr. Anderson. You may want to move the microphone a little bit away from yourself. It's causing a little distortion.

A You have the full responsibility for the entire operation of the campaign from, everything from the original organizational effort, employing, of course, staff, setting up offices, putting together all of the facilities that you'll use during a campaign, employing consultants.

You have the responsibility for media buys, the responsibility for the development of all of the campaign material, the development of the campaign messages that you, of course, want to deliver to the public. All of the things that are associated with a campaign operation.

Q Have you considered the role of money in running a ballot issue campaign?

A Yes, I have. Certainly.

Q In your view, does the use of money in a ballot issue campaign corrupt the political process?

A No. I don't believe so.

Q What, in your opinion, is the most important factor in determining which side will win in a ballot campaign?

A I think the development of a credible, concise, and understandable message regarding your position concerning the ballot issue is the most critical element of a campaign.

Q In your view, Mr. Anderson, can any amount of money

[221] ANDERSON/DIRECT BY KALECZYC

compensate for a campaign message that the electorate does not want to accept?

A No, I don't believe so.

Q I'd like to talk with you for a few minutes about kind of mechanics and components of a campaign.

MR. KALECZYC: If I may, Exhibit 96.

In addition, Your Honor, we have Exhibit 96 also blown up as a demonstrative exhibit for the convenience of the court and witness.

CLERK OF COURT: Sorry, I just blew a cart.

MR. KALECZYC: I think it will be all right for purposes of the witness if he just –

Q (BY MR. KALECZYC) Can you see that all right, Mr. Anderson?

A Move it a little closer.

Q Would you describe first, generically, what Exhibit 96 depicts.

A Well, it depicts the components that are the principal factors that you use during the course of the development of a campaign.

It – You want me to go through the –

Q Yeah. If you would now, sir, yes. If you would kind of comment upon those various factors.

A Starting with the beginning of the first factor, which is the development of the issue and position statements.

[222] ANDERSON/DIRECT BY KALECZYC

When you start a campaign organization, of course, to begin with, the critical things are the employment of the campaign manager, the development of staff, employment of consultants, and an analysis of the ballot issue that's involved.

If you're an opponent of the ballot issue, of course, you want to analyze the issue to determine the impact upon the people that you're representing and that have an interest in opposition to the ballot issue.

You develop a budget and raise the initial funding that's necessary to get the campaign off the ground. And then start polling, a polling effort to determine exactly

where you are with regard to the level of interest in the ballot issue, what the public perception seems to be of the ballot issue; what seems to be at that time from the standpoint of a percentage of people that favor it as compared to opposing it; the reasons why people favor it, or the reasons why they oppose it. What arguments with respect to the issue seem to attract public interest.

And taking that information and plus the interests of your clients and other technical data that you gather, you begin to develop your campaign message and your position statements.

And during the course of this, of course, you're going through the process of identifying the activity of those who

[223] ANDERSON/DIRECT BY KALECZYC

are the proponents of the ballot issue to determine what their message is and what their activity consists of.

You then take the developed message and the information that you've put together and present it to focus groups to reach a determination of the acceptance or non-acceptance of the message that you've developed; whether the message is understandable and credible to the people that are receiving the message.

You identify those people who are going to be your supporters, the resources that are available through them. You, of course, are setting up at the same time, your campaign structure, opening campaign offices, employing staff and personnel, and then you're developing a grass-roots effort which is very important to a campaign,

consisting of people that are located throughout the state that can meet with people in Montana on a more personal basis, contacting local groups and local entities, raising support for your campaign.

You develop your campaign strategy. And, of course, go forward in addition to the initial budget that you've developed, create an additional budget which is predicated upon what you perceive to be the campaign expenses that you're looking forward to.

You prepare a timed event schedule so that you have throughout the course of the campaign, be it a five-month or

[224] ANDERSON/DIRECT BY KALECZYC

seven-month or whatever the period of time involved is, you have a series of events that you have scheduled, the periods of time when media buys would be made and so forth. You're developing coalitions, you're organizing opinion leaders in various areas of the state that support your effort. You're getting group endorsements.

In the I-122 campaign, of course, we got support resolutions from, I don't know how many groups across the state varying from county commissioners to local women's organizations to businesses, whatever.

You develop a speakers' bureau which is active in debating, active in appearing before local clubs and organizations in various areas. And meet with editorial boards of newspapers across the state.

We did a great deal of work in both campaigns with the local weekly papers. We had people that were designated to handle that specifically and nothing other than that.

You, of course, have press kits; you organize your direct mail activity, and then your campaign advertising and media buying. The campaign advertising involves not only just buying media material – or media space in newspapers and time on television and radio, but also the development of the methodology to be followed in getting your message through to the public through those sources.

Then, of course, at the tail end of the campaign, you

[225] ANDERSON/DIRECT BY KALECZYC

want to be sure that those people that are supporting you are registered to vote. And then you have a get-out-the-vote effort to be sure they get out and record their support for you in the election booth.

That's maybe a longer or a brief description.

Q Okay.

With respect to that general description, would those components to a ballot campaign, in your view, apply equally or be applicable both to a proponents' campaign and an opponents' campaign?

A I believe so.

In addition, of course, if you're a proponent, you have at the very beginning of the effort your signature-

gathering effort and your drafting of an initiative component and so forth.

Q Do you have to use each of these components in every campaign?

A No. It, I think, depends on the type of issue that's involved; emotional impact of the issue; the importance of the issue; and the technical nature of the issue, and particularly in the I-122 campaign and to a considerable extent in the I-115 campaign. Both involved technical matters that were, I'm sure, difficult for the public to grasp at the beginning of the campaign. And because of that, there was a greater necessity for expenditure of funds

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[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA MINING ASSOCIATION, NORTHWEST MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, YELLOW BAND GOLD, INC., CONTINENTAL LIME, INC., GOLDEN SUNLIGHT MINES, INC.,

Plaintiffs,

-vs-

ED ARGENBRIGHT, in his official capacity as Montana Commissioner of Political Practices, MIKE COONEY, in his official capacity as Montana Secretary of State,

Defendants,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND, AND CITIZENS FOR I-125,

Defendants-Intervenors.

Civil Docket
No. 98-37-H-CCL

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS

Heard in Courtroom No. 551
United States Courthouse

301 South Park
Helena, Montana
October 21 and 22, 1998

BEFORE THE HONORABLE CHARLES C. LOVELL
UNITED STATES DISTRICT JUDGE

* * *

[96] ANDREWS/Re-cross by Motl

You may step down.

THE WITNESS: Thank you, Your Honor.

THE COURT: Thank you.

Next witness, please.

(Witness excused from the witness stand.)

MR. COCKRELL: Your Honor, we'd call Jerome Anderson, please.

JEROME ANDERSON, having been called as a witness on behalf of the plaintiffs, being first duly sworn according to law, was examined and testified as follows:

CLERK OF COURT: Please state your full name and spell your last name.

THE WITNESS: Jerome Anderson. A-N-D-E-R-S-O-N.

CLERK OF COURT: Thank you.

MR. COCKRELL: Your Honor, as a way of moving this along, I've spoken with the other counsel, and I'm not going to go through any of the foundational information that was already established.

I would just have a few questions for Mr. Anderson on top of the others.

If I could, may I approach the witness, Your Honor?

THE COURT: Yes.

MR. COCKRELL: Show him an exhibit.

[97] J. ANDERSON/Direct by Cockrell

DIRECT EXAMINATION

BY MR. COCKRELL:

Q Mr. Anderson, could you turn to tab 6, please.

A Yes, I have that, counselor.

Q Could you describe that document.

A That is a page of the Helena Independent Record. I believe it's –

Q Actually, the date is on the second page.

A September 29th, 1998.

Q And if you'll look down in the bottom left-hand corner of page one, it concerns the ballot issues which are scheduled to be on the November 3rd general election.

Do you see that article?

A Yes, I do.

Q And does it discuss anything about the poll, at least at that time, as to Initiative 137?

A Yes, sir.

Q And what does it say, if you can find that, Mr. Anderson?

A It says that 50 percent of the Montanans polled favored Initiative 137; 29 percent of those polled opposed the initiative; while 21 percent had no opinion.

MR. COCKRELL: Your Honor, I would move to admit Plaintiffs' Exhibit No. 6.

THE COURT: Any objection?

[98] MR. SCHEIER: No objection, Your Honor.

MR. MOTL: No objection, Your Honor.

MR. WHYTE: No objection.

THE COURT: Exhibit 6 is admitted.

Q (BY MR. COCKRELL) Mr. Anderson, in your earlier testimony, which is now a part of this case, you testified that you had been the campaign manager on at least one or perhaps two campaigns and participated in some others?

A That is correct.

Q Based on your experience in managing those campaigns, do you have an opinion about whether a successful challenge could be mounted to I-137 now?

A I do have such an opinion.

Q What is that opinion?

A That opinion is that an effective campaign – It's too late to mount an effective campaign at this point in time.

MR. COCKRELL: Thank you.

I have no further questions, Your Honor.

THE COURT: Cross-examine. Mr. Scheier.

CROSS-EXAMINATION

BY MR. SCHEIER:

Q Good afternoon, Mr. Anderson.

A Good afternoon.

Q You have filed an affidavit in this lawsuit?

A I did, sir.

[99] J. ANDERSON/Cross by Scheier

Q And one of the chapter – paragraph 22 of that affidavit talked about one critical aspect of a campaign being media advertising campaign. Do you recall that?

A That's correct.

Q Would you tell us – tell the court how important a media advertising campaign is to an effective campaign to defeat an initiative?

A It is one of the elements of an effective campaign. It is certainly not the only element. There are a number of other elements that are requisites to an effective campaign.

MR. SCHEIER: May I approach the witness, Your Honor?

THE COURT: Yes.

Q (BY MR. SCHEIER) I'll show you paragraph 22 of your affidavit.

Could you please read that into the record.

A "Another critical aspect of the campaign is the media advertising program. This involves the costs of media with consultants, production of television and radio spots, production of newspaper ads, and placement of this media advertising. Using simply a week or ten days television and radio time immediately before the election is not effective. A consistent television and radio campaign that is continued for at least a four-week period is critical to the success of an election educational effort. TV time must [100] J. ANDERSON/Redirect by Cockrell

be pre-purchased as early as 90 days before us in order to obtain effective spot placement. All of the radio and newspaper time and space must be pre-purchased and prepaid."

MR. SCHEIER: Thank you, Your Honor.

I have no further questions.

THE COURT: Mr. Motl.

MR. MOTL: I have no questions, Your Honor.

THE COURT: And Mr. Whyte.

MR. WHYTE: I have no questions, Your Honor.

THE COURT: Any redirect?

MR. COCKRELL: Just one, Your Honor.

REDIRECT EXAMINATION

BY MR. COCKRELL:

Q Mr. Anderson, you'd agree that your affidavit contains a number of other paragraphs about other critical components to make up a successful campaign?

A That is correct.

Q Thank you.

MR. COCKRELL: Your Honor, that's all I have.

THE COURT: Any further re-cross?

MR. SCHEIER: No, Your Honor.

MR. MOTL: No, Your Honor.

MR. WHYTE: No, Your Honor.

THE COURT: You're getting off easily today, Mr. Anderson.

* * *

---

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA MINING ASSOCIATION, NORTHWEST MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, YELLOW BAND GOLD, INC., CONTINENTAL LIME, INC., GOLDEN SUNLIGHT MINES, INC.,

Plaintiffs,

-vs-

ED ARGENBRIGHT, in his official capacity as Montana Commissioner of Political Practices, MIKE COONEY, in his official capacity as Montana Secretary of State,

Defendants,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND, AND CITIZENS FOR I-125,

Defendants-Intervenors.

Civil Docket
No. 98-37-H-CCL

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS

Heard in Courtroom No. 551
United States Courthouse

301 South Park
Helena, Montana
October 21 and 22, 1998

BEFORE THE HONORABLE CHARLES C. LOVELL
UNITED STATES DISTRICT JUDGE

* * *

[133] PEARSON/Direct by Cockrell

C. B. PEARSON, II, having been called as a witness on behalf of the plaintiffs, being first duly sworn according to law, was examined and testified as follows:

CLERK OF COURT: Please state your full name and spell your last name, please.

THE WITNESS: Charles Bernard Pearson, II. P-E-A-R-S-O-N.

CLERK OF COURT: Thank you.

THE WITNESS: Thank you.

DIRECT EXAMINATION

BY MR. COCKRELL:

Q Could you restate your name, please, Mr. Pearson.

A C.B. Pearson.

Q Thank you.

MR. COCKRELL: Your Honor, I'm not going to go through all the foundation material, since it's already in. I'll just supplement some of the questions that were already asked.

THE COURT: Very well.

Q (BY MR. COCKRELL) Mr. Pearson, I believe you've sat through most of the trial and have heard a

number of witnesses testify about factors that go into making an effective campaign; is that correct?

[134] A Yes, sir.

Q One of those factors would be an effective grass-roots organization; is that correct?

A One. Yes.

Q And another factor would be whether you can get persuasive or individual persons or groups to support your position; isn't that correct?

A That was testified to, yes.

Q And another factor would be the ability to speak at civic organizations such as Rotary Clubs or Kiwanis or other groups such as that; isn't that correct?

A Yes.

Q And another factor would be whether you got newspapers to publish editorials in support or opposition, whichever side you were on, of your position, Wouldn't that be another factor?

A Yes, sir.

Q And another factor would be whether you had advertising as part of your campaign; wouldn't that be correct?

A That would impact, yes.

Q That would be one of the factors?

And another factor would be whether you can do some type of direct mailing or handing out leaflets or something of that sort; wouldn't that be correct?

A That would be part of a campaign, yes.

* * *

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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
HELENA DIVISION

MONTANA MINING ASSOCIATION, NORTHWEST MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, GOLDEN SUNLIGHT MINES, INC., YELLOW BAND GOLD,	Cause No. 98-37-H-CCL

INC. and CONTINENTAL LIME, INC.,	)	
Plaintiffs,	)	PLAINTIFFS' APPLICATION FOR A PERMANENT INJUNCTION AND ORDER
v.	)	
ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices, and MIKE COONEY in his official capacity as Montana Secretary of State,	)	
Defendants, and	)	
I-125 PROPONENTS' COMMITTEE,	)	
Defendant-Intervenor.	)	

Plaintiffs apply to this Court for a permanent injunction and order, pursuant to Rule 65, Fed.R.Civ.P. and the All Writs Act, 28 U.S.C. § 1651(a): (1) finding the November 3, 1998 Montana general election invalid with respect to I-137 because improperly conducted, and voiding the election with respect to I-137, and (2) permanently enjoining the Secretary of State, in his capacity as the State's Chief Election Officer, and all other persons acting in concert or participation with him, from recognizing I-137 as having been approved by the voters and from including I-137 in his statement of canvass prepared pursuant to MCA 13-27-503 and from certifying the results of the

I-137 initiative election to the Governor and the legislative services division.[1]

Plaintiffs requested in their Complaint that the Court enter injunctive relief as requested in separate applications therefore. This Application is supported by the Plaintiff's Brief in Support of Application for Permanent Injunction and Order and Affidavit of Julie L. Wood filed herewith.

Respectfully submitted this 10th day of November, 1998.

CHRISTENSEN, MOORE,
COCKRELL & CUMMINGS, P.C.

_____

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Association, Northwest Mining
Association, Communities for a

---

[1] In a related case, *Montana Mining Association, et al. v. State of Montana, et al.*, CV-98-48-C-CCL, Montana Mining Association, Yellow Band Gold, Inc., and Majesty Mining, Inc. have filed an application for a temporary restraining order and preliminary injunction. In that application, the Plaintiffs requested that the Secretary of State be barred from preparing a statement of canvas and certifying the results of the vote on I-137 and that the Defendants be temporarily restrained from recognizing and enforcing I-137 until a preliminary injunction hearing could be held. The court need not act on that application if it grants the permanent injunction requested in this case.

Great Northwest, Yellow Band Gold, Inc. and Continental Lime, Inc.

MOUNTAIN STATES
LEGAL FOUNDATION

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CERTIFICATE OF SERVICE

I, _____, one of the secretaries of the law firm, GOUGH, SHANAHAN, JOHNSON & WATERMAN, do hereby certify that I served a copy of the foregoing document in the above matter by mailing a copy thereof, first class postage prepaid, to:

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Date: November 10, 1998

No. 00-1741

Supreme Court, U.S.
FILED
JUN 26 2001
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In The

Supreme Court of the United States

COMMUNITIES FOR A GREAT NORTHWEST and NORTHWEST MINING ASSOCIATION,

Petitioners,

v.

ED ARGENBRIGHT, COMMISSIONER OF POLITICAL PRACTICES of the State of Montana, and MIKE COONEY, SECRETARY OF STATE of the State of Montana,

Respondents,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND, and CITIZENS FOR I-125,

Respondents-Intervenors.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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ISSUE PRESENTED

Whether the district court properly exercised its discretion in determining not to invalidate a state court election.

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STATEMENT OF THE CASE

Petitioners suggest that the State of Montana "coercively and selectively suppressed virtually all opposition" to the passage of Initiative 137 (I-137) and thereby "dictated which view of the initiative the electorate was permitted to hear." Pet. at 2. This statement is wrong as a matter of law and fact. The subject of Petitioners' ire, Initiative 125 (I-125), codified at Mont. Code Ann. § 13-35-227, admittedly prohibited direct corporate spending in connection with ballot issues. The law left open multiple avenues of corporate speech, however, and it certainly did not dictate which view of a particular ballot issue that the Montana electorate was permitted to hear.

Montana voters approved I-125 at the general election in November 1996. I-125 permitted corporations to establish and administer separate, segregated funds from which contributions to and expenditures in support of ballot issues could be made. Mont. Code Ann. § 13-35-227(3). Contributions to these segregated funds could come from many sources, including corporate shareholders, corporate employees, or other members and officers of the corporation. *Id.* I-125 prohibited only contributions that come directly from the corporate treasury. *Id.*

I-125 further provided that these restrictions did not apply to certain non-profit corporations formed for the purpose of promoting political ideas. Mont. Code Ann. § 13-35-227(4). This exception, designed to conform with this Court's holding in *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), covered corporations that do not

engage in business activity, corporations whose shareholders have no private claim on the corporate assets, corporations which do not have for-profit corporations as members, and corporations which do not receive in the aggregate more than five percent of their annual total revenues from for-profit corporations. Mont. Code Ann. § 13-35-227(4).

I-137 qualified for the 1998 Montana general election ballot on July 16, 1998. I-137 sought to prohibit new cyanide heap and vat leach open-pit gold and silver mines in Montana. A majority of 53 percent of Montana voters in the November 1998 general election approved I-137. I-137 is now codified at Mont. Code Ann. § 82-4-390.

Petitioners fail to disclose that numerous corporations took advantage of the segregated fund option available under Mont. Code Ann. § 13-35-227(3) to raise significant amounts of money in 1998 in support of, or opposition to numerous ballot issues. For example, the Montana Education Association (MEA) established a segregated fund in 1998 that donated more than $30,000 to various ballot issues. App. 50-52. I-125 had negligible effect on the political spending of the MEA during the 1998 general election campaign. The $32,000 spent by the MEA on ballot issues during the general election campaign in 1998, under the dictates of I-125, represented more than the MEA had spent on ballot issues in all but one campaign between 1990 and 1996. *Id.* at 56-57.

Similarly, the Montana Mining Association (MMA) spent $10,140 in opposition to a water quality initiative in the 1996 election, before the enactment of I-125. App. 34.

The MMA considered the defeat of this water quality initiative to be very important to its members. *Id.* at 33. By comparison, in 1998, the MMA's segregated ballot fund had raised more than $10,000 to be used to oppose I-137 by the time of the trial on I-125 in October 1998. *Id.* at 27, 30, 36-37.

On February 14, 1997, opponents of I-125 filed a complaint in federal district court in *Montana Chamber of Commerce v. Argenbright*, CV 97-66-H-CCL ("*Chamber*"), the Honorable Charles C. Lovell presiding. The complaint in the *Chamber* case sought a declaratory judgment that I-125 violated the First Amendment rights of corporations and these opponents also sought a permanent injunction against its enforcement. The district court set the *Chamber* case for trial for May 18, 1998. Upon joint stipulation and motion of the parties, however, the district court vacated the trial date and set a new trial date for October 13, 1998. As indicated by the district court, but for the parties' request, the district court would have heard and decided the *Chamber* case in the spring of 1998, well in advance of the 1998 general election.

A different group, including Petitioners, seeking largely the same relief, filed a separate action in federal district court, also to be heard by Judge Lovell, on September 1, 1998. See *Montana Mining Ass'n v. Argenbright, et al.*, CV 98-37-H-CCL ("*MMA*"). The complaint in the *MMA* case also sought to enjoin the election on I-137, set for November 3, 1998, a mere eight weeks away. Petitioners waited more than three months after the Montana Secretary of State approved the form of the proposed I-137 on May 18, 1998, a fact widely reported in the Montana press, before filing their complaint, as noted by

the district court in *Montana Mining Ass'n v. Simonich*, CV 98-48-H-CCL. App. 14.[1] In *Simonich*, Judge Lovell denied the request filed by Montana Mining Association and two other mining companies for a preliminary injunction on I-137. *Id.* at 15.

On May 24, 1998, the Commissioner of Political Practices for the State of Montana issued an opinion related to an inquiry from Seven-Up Pete Joint Venture, the developers of a proposed open-pit gold mine. *Id.* at 9. The Commissioner's opinion found that I-125 did not apply to the Seven-Up Pete Joint Venture, a partnership comprised of several corporations, in relation to its planned campaign to oppose I-137. *Id.* The Montana Secretary of State certified on July 16, 1998, that the requisite number of signatures had been gathered to place I-137 on the general election ballot. *Id.* The Petitioners did not challenge the proposed initiative at that time, however, and instead, waited another six weeks to file their complaint. *Id.* at 13-14.

The district court consolidated the *Chamber* and the *MMA* cases and by agreement of all the parties, set the cases for trial between October 13 and 22, 1998, only six weeks after Petitioners filed their action. At the end of the trial, on October 22, 1998, the district court ruled that

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[1] Although the district court's Order in *Simonich* is not part of the record in this case, it certainly is related to this case and involves parties, including the Montana Mining Association, that were involved in this same action. Moreover, Fed. R. Evid. 201(b)(2), permits this Court to take judicial notice of a decision of a federal district court. *State of Florida v. Charley Toppino & Sons, Inc.*, 514 F.2d 700, 704 (5th Cir. 1975).

I-125 was unconstitutional, but the district court refused to enjoin the scheduled election on I-137. The timing of the district court's decision left Petitioners eleven days in which to spend unrestricted amounts of money in opposition to I-137. The Ninth Circuit affirmed the district court on both issues. *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000).

REASONS FOR DENYING THE WRIT

I. Federal Courts Should Invalidate State Court Elections Only When Serious Voting Violations or Aggravating Factors Have Been Demonstrated.

Petitioners seek to have this Court invalidate an otherwise lawful state election. Petitioners do not allege any voting irregularities, any disenfranchisement of voters, any miscounted ballots or improperly cast ballots. Petitioners' entire claim for invalidating the otherwise lawful state election rests on the sole allegation that a Montana statute, Mont. Code Ann. § 13-35-227, prevented them from spending as much money as they would have liked to oppose I-137.

A. Petitioners Failed to Demonstrate the Type of Serious Constitutional Violation That Warrants a Federal Court's Invalidation of an Otherwise Lawful State Election.

As a general rule, a federal court's decision to set aside or invalidate a state election is a "drastic if not staggering remedy" that should be reserved for the most egregious cases of constitutional violations. *Soules v.*

Kauaians for Nukolii Campaign Comm., 849 F.2d 1176, 1180 (9th Cir. 1987), *quoting Bell v. Southwest*, 376 F.2d 659, 662 (5th Cir. 1967). The type of constitutional violations that have been found to justify a federal court's decision to set aside a state election are limited to "serious voting violations or aggravating factors, such as racial discrimination or fraudulent conduct." *Cook v. Luckett*, 735 F.2d 912, 922 (5th Cir. 1984).

The Ninth Circuit has noted that federal courts should *not* invalidate state elections on substantive due process grounds absent a finding that voters relied on an established election procedure *and* a finding that significant voter disenfranchisement resulted from the state's unexpected departure from the established election procedure. *Bennett v. Yoshina*, 140 F.3d 1218, 1226-27 (9th Cir. 1998); *see also Duncan v. Poythress*, 657 F.2d 691, 703 (5th Cir. 1981) (holding that entire electorate was disenfranchised when state officials refused to hold a special election, as required under state law, to fill a vacant seat on the state supreme court); *Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) (finding that "outrageous racial discrimination" requires invalidating a state election "simply for its lack of integrity").

Petitioners in this case surely can make no argument that any voters in Montana were disenfranchised at the election on I-137. More than 325,000 voters in Montana cast ballots on the I-137 initiative. Pet. at 6 n.3. Petitioners make no allegation that any potential voters were kept from the polls. Similarly, Petitioners make no allegation that election officials in Montana improperly counted ballots, improperly counted invalid ballots, or otherwise

departed from established and normal election procedures in Montana. Petitioners are left to argue, in effect, that the district court should have invalidated the election on I-137 because the Petitioners were not able to spend as much money in opposition to I-137 as they would have liked. Such a claim has never moved a federal court to invoke the "staggering remedy" of invalidating an otherwise lawful state election. *Soules*, 849 F.2d at 1180.

Even this last argument is found wanting, however, when examined in light of the record. As affirmed by the Ninth Circuit, the Petitioners, and groups related to them, spent the same amount in opposition to I-137 in the 1998 general election as they had spent in their successful opposition to I-122, an initiative in the 1996 general election that would have restricted the ability of mining companies to discharge pollutants into Montana's waterways. *Argenbright*, 226 F.3d at 1053-54. This fact belies the Petitioners' claim that the State of Montana "had completely 'deprive[d]' the [Petitioners] of the ability 'to communicate their political views' and 'political ideas' to the electorate." Pet. at 10.

Moreover, Petitioners' claim that I-125 prevented them entirely from campaigning against I-137 lacks further credibility when considered in light of the efforts made, or more precisely *not* made, by Petitioners to campaign against I-137. For example, Petitioners' representatives at trial, testified that Petitioners had taken no steps to determine what political activities were permitted under I-125 at the time of the election campaign on I-137. App. 19-25, 27-37, 40-47. In fact, Petitioners had not established a segregated fund, permitted under Montana law,

to oppose I-137. *Id.* at 21, 24. Further, Petitioners took no steps to solicit their members for individual contributions to the campaign against I-137. *Id.* at 29. And most surprisingly, Petitioners failed even to inform their members of the existence of I-137 on the 1998 general election ballot in Montana and its possible ramifications in their newsletter, surely an action permitted under I-137. *Id.* at 20, 28.

Similarly, the testimony at trial demonstrated that individual corporate members of the Montana Mining Association had made no efforts to participate in the campaign against I-137. These corporate members of the Montana Mining Association admitted on cross-examination that they failed to establish a segregated fund to oppose I-137 and that they did not try to solicit individual contributions in opposition to I-137. These members justified their inaction on their fears of violating the dictates of I-125. App. 19-25, 40-47. These same members conceded, however, that they took no steps, such as contacting the office of the Commissioner of Political Practices for the State of Montana, to determine what activities would have been permitted under I-125. *Id.*

Other corporations affected by I-137 suffered from similar failures. As noted by Mike Cooney, then Secretary of State for the State of Montana, based on his experience as the chief elections officer for the State of Montana and his own state-wide campaigns, the opponents of I-137, including Petitioners, made a concerted effort *not* to participate in the campaign against I-137 in order to influence the district court regarding the alleged onerousness of the restrictions imposed on corporations by I-125. App. 61-62. Thus, the "gag rule" repeatedly referenced in the

Petition seems more to have been self-imposed by Petitioners than to have been dictated by the restrictions of I-125. *See Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988) (noting that a party challenging the validity of an election should not be permitted to engage in "sandbagging" tactics to improve its chances in court).

B. The Ninth Circuit Properly Considered the Entire Record of Proceedings in Affirming the Decision of the District Court Not to Invalidate the Election on I-137.

Despite this evidence in the record, Petitioners repeatedly chastise the Ninth Circuit, and Judge Rymer, the author of the majority opinion, in particular, for allegedly making up out of whole cloth findings regarding Petitioners' ability to campaign against I-125. In fact, Petitioners argue that Judge Rymer violated Rule 52(a) of the Federal Rules of Civil Procedure by her alleged failure to find that I-125 prohibited Petitioners entirely from campaigning against I-137. Pet. at 21.

The district court's account of the evidence with regard to Petitioners' ability to campaign against I-137 admittedly was succinct.[2] Nevertheless, the Ninth Circuit

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[2] It should be noted that Petitioners were fully aware of the related proceedings in *Simonich, supra*, in which Judge Lovell denied the motion for a preliminary injunction to prohibit enforcement of I-137 filed by the Montana Mining Association and other mining companies. Judge Lovell's order runs to 22 pages and lays out in great detail his reasons for denying the motion for a preliminary injunction and their factual underpinnings.

had before it the entire record in this case, including the transcripts of testimony by representatives of the Petitioners regarding the Petitioners' complete failure to take advantage of avenues of speech available to them under I-125 and Petitioners' delay in seeking to halt the election on I-137. Petitioners could have challenged I-137 even before July 16, 1998, when it qualified for the Montana general election campaign. *See Michigan Chamber of Commerce v. Austin*, 788 F.2d 1178, 1183 (6th Cir. 1986) (holding that a challenge to a proposed campaign finance initiative ripened even before the proposed initiative had qualified for the ballot in order to allow sufficient time for judicial review); *Americans for Medical Rights v. Heller*, 2 F. Supp. 2d 1307, 1313 (D. Nev. 1998) (holding that plaintiffs have standing to challenge a proposed ballot initiative even before the initiative qualifies for the ballot due to imminent injury during the petition-gathering process).

The district court rushed this matter to trial a mere six weeks after the filing of Petitioners' complaint in order to resolve the issues in advance of the election on I-137. Petitioners argue that the eleven days between the district court's decision to invalidate I-125 and the election on I-137 did not afford them sufficient time to "educate" the electorate in Montana. As seen from the record in this matter, however, the choice of when to file the complaint and when to resolve the controversy surrounding their ability to oppose I-137 was largely their own doing. The Ninth Circuit properly reviewed this record and affirmed the decision by the district court not to invalidate the election on I-137. Nothing in Rule 52(a) of the Federal Rules of Civil Procedure prohibited the Ninth

Circuit from undertaking such a review and affirming the decision of a district court not to invalidate a state election.

II. Petitioners' Assertion That the Decision of the Ninth Circuit to Refuse to Invalidate the Results of the Election Creates a Conflict With the Decisions of Courts in Other Circuits Is Illusory.

Petitioners suggest that the decision of the Ninth Circuit in this case creates conflicts with the decisions of courts of appeal on two separate issues. First, Petitioners argue that the Ninth Circuit's decision to affirm the district court's refusal to invalidate the election on I-137 despite the district court's finding that I-125 prevented Petitioners from campaigning fully against I-137 allegedly conflicts with decisions from other courts of appeal that require a district court to invalidate a state election whenever it finds a constitutional violation. Pet. at 24-27. Petitioners argue that further conflict arises from the Ninth Circuit's decision not to reverse the district court for its alleged failure to analyze whether invalidating the I-137 election was a proper remedy. Pet. at 26 n.7. Both alleged conflicts prove to be illusory.

A. Federal District Courts Enjoy Broad Discretion in Fashioning Equitable Relief.

Petitioners posit the unremarkable claim that courts in the Ninth Circuit, along with other federal courts, have discretion to invalidate state elections in certain instances. Pet. at 24, 25. In making this point, Petitioners rely upon decisions from no fewer than seven separate

courts supporting the notion that federal courts have discretion to invalidate state elections when "the election process itself reaches the point of patent and fundamental unfairness." *Gold v. Feinberg*, 101 F.3d 801 (2d Cir. 1996). The federal court's discretion is not in doubt.

To further bolster this point, Petitioners quote extensively from a concurring opinion written by Justice Kennedy when he sat on the Ninth Circuit. Pet. at 25. As quoted by Petitioners, Justice Kennedy conceded that federal courts could invalidate state court elections in certain cases:

> Federal courts will enter orders to invalidate state election results where voters have suffered an unconstitutional deprivation of the opportunity to vote even when it is not clear that the outcome would have been affected, but such relief has been reserved for instances of willful or severe violations of established constitutional norms.

Pet. at 25; *quoting McMichael v. County of Napa*, 709 F.2d 1268, 1273 (9th Cir. 1983) (Kennedy, J., concurring), *citing Griffen v. Burns*, 570 F.2d 1065, 1080 (1st Cir. 1978). Petitioners in this case cannot contend seriously that anyone, least of all the corporations that they represent, "suffered an unconstitutional deprivation of the opportunity to vote" on I-137. Petitioners can argue only that the corporations were hindered in their ability to spend as much money as they would have liked in opposition to I-137.

Moreover, Petitioners fail to inform the Court of the next sentence in Justice Kennedy's concurring opinion in which he concludes that the "present case is not in that category." *McMichael*, 709 F.2d at 1273-74 (Kennedy, J.,

concurring). Petitioners further fail to disclose that the dicta quoted from Justice Kennedy's concurring opinion arose in a case in which the Ninth Circuit dismissed a challenge to a county-wide vote on a referendum issue for lack of standing. In fact, Justice Kennedy concurred separately to offer his view that the majority gave too much credence to the claim by even engaging in the standing analysis. He argued instead that the action "should be dismissed because it fails to state a claim upon which the relief sought can be granted." *Id.* at 1273 (Kennedy, J., concurring). The relief sought in *McMichael*, invalidation of an election, is the same relief sought by Petitioners in this case.

Petitioners move from the unremarkable proposition that federal courts may invalidate state elections in certain instances to the wholly remarkable claim that federal district courts lack discretion *not* to invalidate a state election if the federal court finds irregularities with the election process. Pet. at 25. Petitioners can cite only one case, however, in which a federal court allegedly has held that a district court lacks discretion *not* to invalidate a state election upon a finding by the federal court that certain irregularities plagued the state election. *See* Pet. at 25, *citing Smith v. Cherry*, 498 F.2d 1098, 1113 (7th Cir. 1973 (per curiam)).

In this nearly thirty-year-old case, the Seventh Circuit, in a per curiam opinion, reversed an order by a federal district court dismissing an action for failure to state a claim upon which relief could be granted. The plaintiffs alleged a fraudulent scheme by which a group of Democratic party officials conspired to defeat a candidate by having a sham, or stand-in, candidate run against

the candidate in a Democratic primary. The district court dismissed the complaint on the ground that no impermissible discrimination had been shown. *Smith*, 498 F.2d at 1100. The Seventh Circuit reversed and remanded the cause for further proceedings.

The majority of the opinion discussed the abstention doctrine and whether it applied with regard to a federal court's review of a state election. The court also provided guidance on the sufficiency of the complaint. The court recognized that the complaint, as drafted, alleged sufficient violations of federal law upon which relief could be granted. The court acknowledged, however, that due to the incomplete state of the record in the case "it is impossible to determine the merits of this controversy." *Smith*, 498 F.2d at 1103.

In providing guidance to the district court remand, the court made the following suggestion:

> If the plaintiffs prove an agreement that Cherry would be a stand-in candidate, and show a reasonable possibility that Cherry's sham candidacy affected the outcome of the election, then the district court *should* order new primary and general elections.

Id. (emphasis added). This conditional statement hardly smacks of a conflict of the degree calling for this Court's attention. The Seventh Circuit merely states that (1) if the plaintiffs prove an agreement regarding a stand-in candidate, and (2) if the plaintiffs show a reasonable possibility that the sham candidacy affected the outcome of the election, (3) then the district court *should* order new elections. The Seventh Circuit did not state that a district court *must* order new primary and general elections.

Instead, the court specifically relied upon the discretion of the district court in suggesting the district court "should" order new elections. *Id.* The district court in this case properly exercised similar discretion in rejecting Petitioners' request to invalidate the election on I-137.

B. The District Court Properly Exercised Its Discretion in Determining *Not* to Invalidate the Election on I-137.

Petitioners suggest that further conflict results from the Ninth Circuit's decision *not* to reverse the district court for its alleged failure to analyze whether enjoining or invalidating the mining initiative election was a proper remedy. Pet. at 26 n.7; *citing Gjerten v. Board of Election Commissioners for City of Chicago*, 791 F.2d 472, 479 (7th Cir. 1986). Surprisingly, however, in *Gjerten*, the Seventh Circuit reversed an order to hold a special election because the district court had failed to analyze whether the plaintiffs "demonstrated that the unconstitutional practice had a significant impact on the particular election they sought to have invalidated." *Gjerten*, 791 F.2d at 479.

Petitioners argue that the district court in this case similarly failed to analyze whether the alleged unconstitutional restriction on speech in this case had a significant impact on the mining initiative election. Once again Petitioners omit mention of important points raised by the court in *Gjerten*. For example, the court rejected general rules in determining whether drastic relief is required, such as invalidating a state election; instead, "each case must be considered" individually. *Gjerten*, 791

F.2d at 479. As noted by the Seventh Circuit in *Gjerten*, "an appellate court normally will give great deference to the district court's decision as to the precise equitable relief necessary in a particular case." *Id., citing Griffin v. Burns*, 570 F.2d 1065, 1079 (1st Cir. 1978).

Petitioners' argument flies in the face of the well-established rule that the decision as to the precise equitable relief to award falls to the discretion of the district court. *Lemon v. Kurtzman*, 411 U.S. 192 (1973):

> In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow. Moreover, in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable.

Id. at 200.

In this case, the district court determined that invalidating the election in I-137 was not necessary. The district court determined that invalidating the election in I-137 would not be fair to the Montanans who cast their votes in good faith in support of it. *Cf. Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) (invalidating various regulations on the petition-gathering process in Colorado, but not invalidating any ballot issues passed into law while these invalid regulations were in effect). And finally, the district court determined that invalidating the election in I-137 would not be workable under the circumstances. All of these decisions go to the heart of the discretion afforded to the district court in crafting equitable relief. The Ninth Circuit properly

deferred to the district court in affirming the district court's decision not to invalidate the election on I-137.

CONCLUSION

Petitioners have failed to demonstrate any of the types of serious constitutional violations that warrant the invalidation of the I-137 election. No potential voters were disenfranchised, no improper ballots were cast or counted, and no established election procedures were ignored. Petitioners must rely on the allegation that the Montana election law in effect for part of the campaign on I-137 prevented them from spending as much money as they would have liked in opposition to I-137. Such an allegation fails to rise to the level of a serious constitutional violation that justifies federal court intervention into the otherwise lawful state election on I-137.

For the foregoing reasons, Respondents respectfully request that the Court deny the petition for writ of certorari.

Respectfully submitted,

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June 2001

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App. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

* * *

MONTANA MINING ASSOCIATION, Inc., a non-profit corporation; MAJESTY MINING, INC., a Montana corporation, and YELLOW BAND GOLD, INC., a Montana corporation,

Plaintiffs,

-v-

MARK SIMONICH, in his official capacity as Director of the Montana Department of Environmental Quality; JOSEPH GERBASE, RUSSELL HUDSON, KIM LACEY, DAN DENNEHY, ROGER PERKINS, GARON SMITH, and JOHN DOE, all in their official capacities as Members of the Montana Board of Environmental Review; MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY and MONTANA BOARD OF ENVIRONMENTAL REVIEW,

Defendants,

and

CV 98-48-H-CCL

ORDER

(Filed Mar. 19, 1999)

MONTANA ENVIRONMENTAL INFORMATION CENTER; MONTANANS FOR COMMON SENSE MINING LAWS – FOR I-137; and MONTANA COUNCIL OF TROUT UNLIMITED,

Defendant-Intervenors.

* * *

Before the court is Plaintiffs' motion for preliminary injunction. Oral argument was heard on January 22, 1999, and post-argument briefing was completed on February 8, 1999. The court, having heard the arguments of the parties and having considered the briefs, is prepared to rule.

Procedural Background

Plaintiffs filed their original complaint on November 4, 1998. By their complaint, Plaintiffs seek declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202. The focus of Plaintiffs' complaint is November 3, 1998, passage of a Montana ballot initiative, Initiative 137 ("I-137"), which prohibits cyanide leach processing at any new open-pit gold and silver mines or expansions to existing mines. Plaintiffs argue that I-137 is unconstitutional and that its passage violated their constitutional right to procedural and substantive due process. Plaintiffs filed their Fourth Amended Complaint on February 2, 1999.

In a related case, one of the Plaintiffs, Montana Mining Association ("MMA"), had also filed a complaint[1] on September 1, 1998, challenging the constitutionality of Initiative 125 ("I-125"), which had been passed by Montana voters in 1996. MMA complained that I-125 violated its First Amendment right to free speech in the political arena because it prohibited corporate contributions to ballot initiative campaigns. MMA also complained that it was being prevented by I-125 from campaigning against I-137 in the 1998 election cycle. The court consolidated trial on the merits in MMA's I-125 suit with the trial pending in another case[2] challenging the constitutionality of I-125. On October 22, 1998, after hearing closing arguments in the MMA trial challenging I-125, the court ruled from the bench. The court decided that I-125 was unconstitutional and enjoined the State of Montana from enforcing it against the MMA during the I-137 ballot initiative campaign, of which there were eleven days remaining. Based on the testimony presented at trial, the court also found that many factors influence election outcome, particularly the political values, predispositions, and party loyalty of the voters, and that neither money nor media advertising is the sole or even the single most important variable controlling election outcome. Thus, the court decided MMA's constitutional challenge to I-125 approximately seven weeks after MMA filed its complaint.

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[1] *Montana Mining Association, et al. v. Argenbright, et al.*, CV 98-37-H-CCL.

[2] *Montana Chamber of Commerce, et al. v. Argenbright, et al.*, CV 97-6-H-CCL. The October 13, 1998, trial date had been set on April 22, 1998.

Legal Standard for Preliminary Injunction

> "In this circuit, the test for granting a preliminary injunction is whether a party has demonstrated: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation, and the balance of hardships tips sharply in favor of the party seeking relief."

Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1073 (9th Cir. 1996) (*citing Sierra Club v. Marsh*, 816 F.2d 1376, 1382 (9th Cir. 1987)). In addition, when the public interest is involved, the court must examine whether the public interest favors the preliminary injunction applicant. *Fund for Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992) (*citing Caribbean Marine Serv. Con. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988)). When the subject of the proposed preliminary injunction is a law enacted for protection of the public interest, the applicant may be held to a higher standard of showing a likelihood of success on the merits of the claim. *See Toy Mfr. of America, Inc. v. Blumenthal*, 806 F. Supp. 336, 340 (D. Conn. 1992), *aff'd* 986 F.2d 615 (2nd Cir. 1993). Because injunctive relief is an equitable remedy, the court may consider an equitable defense such as laches in determining whether to exercise its equitable powers. *Banks v. Bd. of Educ.*, 659 F. Supp. 394, 397-98 (C.D. Ill. 1987).

Discussion

Plaintiffs seek an order enjoining the State of Montana from enforcing I-137, which prohibits new permits for cyanide heap leach processing. Plaintiffs assert that

they have shown serious questions on the merits of their claims because the 1998 election process was fundamentally flawed due to the operation of I-125 (prohibiting corporate contributions to ballot issue election campaigns), and that this fundamental flaw violated Plaintiffs' right to substantive due process. Plaintiffs acknowledge that the court struck down I-125 on October 22, 1998, leaving eleven days to campaign without the prohibitions imposed by I-125, but Plaintiffs claim that this was insufficient time for them to conduct a successful opposition campaign.

Plaintiffs analogize their circumstances to those of the plaintiffs in *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998) (state election procedures for vote counting did not violate substantive due process), *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), *cert. denied*, 459 U.S. 1012 (1982) (state's refusal to hold special election deprived voters of constitutional right to fill judgeship vacancy), and *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) (state's retroactive invalidation of absentee and shut-in ballots for primary election violated due process).

Those cases discuss a federal court's power to invalidate a state election when the state's electorate is disenfranchised. Here, Plaintiffs argue that because the Montana electorate was deprived of Plaintiffs' full and complete (albeit hypothetical) opposition campaign, the Montana electorate was completely disenfranchised in the November 1998 election. Plaintiff Yellow Band Gold raises the possibility of irreparable injury by asserting that a delay on its permit application could jeopardize its existence as a business.

Upon being questioned by the court regarding the reason for MMA's delay in waiting to file its I-125 challenge on September 1, 1998, counsel for MMA stated that I-137 was not certified for the ballot until July 16, 1998. After certification, Plaintiffs brought a petition for relief before the Montana Supreme Court and waited approximately one month for that court to decide the petition. One week after that petition was denied, Plaintiffs filed both the instant lawsuit and a similar lawsuit in state district court.

Defendant State of Montana ("Montana") argues that Plaintiffs have not demonstrated a likelihood of success on the merits. Montana also asks the court to balance the equities by considering Plaintiffs' unjustified delay in filing their complaint.

Montana also questions the propriety of the remedy sought by Plaintiffs. Montana points out that the constitutional violation complained of was caused by I-125. This court struck down I-125 eleven days before the I-137 election. Montana argues that the appropriate remedy for the finding that I-125 was invalid was to strike down I-125, not to throw out another law (I-137) merely because it was enacted following a campaign during which I-125 was partially in effect.[3]

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[3] The court notes that the Supreme Court case cited by Plaintiffs in oral argument, *Buckley v. American Constitutional Law Foundation*, 1999 WL 7723 (Jan. 12, 1999), accords with Defendant Montana's argument because it was the offending Colorado statutes regulating the petition process that were struck down as unconstitutional, not the laws enacted during the time period when petition regulations were still in effect.

From Montana's point of view, to throw out I-137 because I-125 was unconstitutional severely penalizes the Montana citizens who voted on I-137 and essentially gives the I-137 election to Plaintiffs as compensation for the I-125 constitutional violation.

Finally, Montana contends that there was no disenfranchisement of Montana voters in the I-137 election. A voter information pamphlet was mailed to the home of every registered voter, explaining the elements of I-137 in a balanced fashion and providing both a proponents' and an opponents' view of the measure. No Montana voter was prevented from voting in the I-137 election. There was no procedural irregularity in the election process itself. Defendant Montana argues that ultimately there is no way for Plaintiffs to prove that the I-125 prohibitions in effect until October 22, 1998, affected the outcome of the I-137 election on November 3, 1998.[4]

For all of these reasons, Defendant Montana argues that Plaintiffs' likelihood of success on the merits of their due process claim is minimal and inadequate to meet the threshold requirement for the issuance of a preliminary injunction. As for the threat of irreparable injury to Plaintiffs Yellow Band Gold and Majesty Mining, Montana's position is that any injury found by the court can be compensated by Defendant Montana under Plaintiffs'

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[4] *Griffin v. Burns*, 570 F.2d at 1079-80, briefly touches on this issue, stating that the outcome test may be applied to determine whether an election was controlled by an invalid process and judicial intervention is warranted, but that mathematical precision is not required.

Fifth Amendment takings claim. Finally, Defendant Montana asserts that the court should consider the equitable defense of laches when determining Plaintiffs' application for preliminary injunction.

Laches

The court has raised *sua sponte* the potential application of the equitable defense of laches to the application for preliminary injunction. The parties have provided supplemental briefing on the point, Plaintiffs arguing that laches is not applicable, and Montana and Defendant-Intervenors arguing that laches is available to them as a complete defense to the application for preliminary injunction.

The relevant facts are as follows. The constitutionally infirm I-125 measure was passed by Montana voters in November, 1996, and it prohibited corporations from contributing to ballot initiative campaigns. On February 18, 1998, this court set down trial in the *Montana Chamber v. Argenbright* case (which challenged I-125) for May 18, 1998. On joint stipulation and motion of the parties to that case, the court vacated the trial date on April 22, and reset the *Montana Chamber* trial for October 13, 1998. But for the parties' request, the case would have been tried and decided in the spring of 1998.

In mid-April, Montana newspapers reported that a proposed ballot initiative to prohibit cyanide heap leach open-pit mining had been submitted to the State of Montana for review. On May 18, 1998, the Montana Secretary of State approved the form of that initiative, a fact which was reported by the Montana press. The I-137 proponents

began circulating signature petitions the next day. On May 24, 1998, the Montana press also reported the issuance of an opinion by the Commissioner of Political Practices in response to a query from the Seven-Up Pete Joint Venture (developers of a proposed open-pit gold mine) regarding the application of I-125 campaign prohibitions to it vis-a-vis the I-137 opposition campaign. On July 16, 1998, the Montana Secretary of State certified that the requisite number of signatures had been gathered to place I-137 on the ballot in the November 3 election. On November 3, 1998, a majority of the Montana electorate voted in favor if I-137.

Plaintiffs claim that they did not believe that the requisite number of signatures would be gathered until July 16, 1998, and that furthermore they would not have had standing to challenge I-125 until I-137 was certified on July 16.

Defendant-Intervenors argue that Plaintiff MMA was not diligent in filing its challenge against I-125. The MMA lawsuit was not filed until eight weeks before the election. Despite this late challenge, the court did try MMA's case, and the court found I-125 unconstitutional with almost two weeks of the I-137 campaign remaining. Defendant-Intervenors assert that they need only show that Plaintiffs' delay was unreasonable and resulted in prejudice to the Defendant. *Knox v. Milwaukee Bd. of Elections Comm'rs*, 581 F. Supp. 399, 402 (E.D. Wis. 1984).

Laches can be used to bar a plaintiff's claim entirely, *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990), or simply to deny temporary injunctive relief, *Banks v. Bd. of Educ.*, 659 F. Supp. 394 (C.D. Ill, 1987). Once lack of diligence is

established, it becomes plaintiff's burden to justify the delay. *PAC for Middle America v. State Bd. of Educ.*, 1995 WL 571887, *3 (N.D. Ill. Sept. 22, 1995). When plaintiffs do not assert a timely preelection challenge, "they will be barred from the equitable relief of overturning the results of the election." *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988). This is so because the voiding of a state election is considered to be a "drastic if not staggering" remedy. *Id.* at 1180 (quoting *Bell v. Southwell*, 376 F.2d 659, 662 (5th Cir. 1967)).

In summary, Defendant-Intervenors conclude that the length of Plaintiff MMA's delay is serious, that Plaintiffs have advanced no reasonable excuse for the delay, and that the delay has had the prejudicial effect of allowing an entire election to be thrown into question, which is a direct threat to political continuity based on the finality of elections. Here, Defendant-Intervenors argue that the heart of laches "is not, like [a statute of limitations], a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced. . . . " *Holmber v. Armbrecht*, 327 U.S. 392, 396 (1946) (quoting *Galliher v. Caldwell*, 145 U.S. 368, 373 (1892)).

Defendant-Intervenors point out that the offending campaign law was passed in 1996, and that Plaintiff MMA waited until September 1, 1998, to challenge the application of that campaign law to a November, 1998 election. Defendant-Intervenors charge that Plaintiff MMA delayed suit for five months after the I-137 ballot initiative process was underway and had been publicized in the Montana press, leaving virtually no time for this court to determine the issue before the campaign. Defendant-Intervenors challenge Plaintiff MMA's excuse that it

did not believe that the I-137 proponents would be able to gather enough signatures for the ballot as being a weak excuse, given the historical context of the I-137 issue and the publicity attendant to it. Moreover, this excuse offers no justification whatsoever for Plaintiff MMA's six-week delay after certification of I-137 for the ballot.

Defendant Montana also argues that the defense of laches should bar Plaintiffs' request for preliminary injunction as a result of Plaintiffs' unexcused delay. Defendant Montana also cites *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988), a case wherein plaintiffs filed a suit two months after a special initiative election was held. The plaintiffs in *Soules* claimed that the decision to hold the special election involved an Equal Protection Violation, but the district court and the appellate panel agreed that laches barred plaintiffs' claim because they "knew the basis for their alleged equal protection challenge well in advance of the proposed special election and . . . failed to explain adequately their failure to press the claim before the election." *Id.* at 1182.[5] Montana asserts that in this case

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[5] The Ninth Circuit panel in *Soules* notes that there is a line of cases holding that parties challenging state election procedures must bring their complaints before the election, not after, unless there is no opportunity for preelection filing. *Soules*, 849 F.2d at 1180. Failure to file a preelection complaint that allows the problem to be cured before the election justifies the applications of laches as a complete bar to the equitable relief of invalidating the election. *Id.* (citing *Chinese for Affirmative Action v. Leguennec*, 580 F.2d 1006, 1008 (9th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979); *United States v. City of Cambridge*, 799 F.2d 137, 141-42 (4th Cir. 1986); *Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 188-83 (4th Cir. 1983); *Hart v. King*, 470 F. Supp. 1195, 1198 (D. Haw. 1979)).

Plaintiffs likewise knew the basis for their constitutional claim well in advance of the November, 1998, election, yet failed to press the claim in sufficient time before the election to allow for any remedy other than voiding the election. Montana asserts that Plaintiffs' unexcused delay, given the remedy sought, results in extreme prejudice to Montana's voters and to the state electoral process.

Montana argues that it is not enough merely to file a pre-election complaint, but that the party challenging the election must timely file a pre-election complaint, *i.e.*, leaving sufficient time to cure the problem before the election. Montana cites *Barthelmes v. Morris*, 342 F. Supp. 153 (D. Md. 1972), wherein a district court decided that plaintiffs' request for an injunction against the election of a delegates to the Democratic National Convention was barred by laches because plaintiffs had waited until less than eight weeks before the election to file their lawsuit. *Id.* at 159-61. Montana concludes that had Plaintiffs filed a timely pre-election challenge, the constitutional problems of the I-137 campaign could have been cured prior to the conclusion of that campaign.

Analysis

This court regards a preliminary injunction as a serious matter, "a very far reaching power never to be indulged in except in a case clearly warranting it." *Sierra Club v. Hickel*, 433 F.2d 24, 33 (9th Cir. 1970). In this case, the court must balance the constitutional violation alleged by Plaintiffs and the requested remedy of invalidation of a state election, with the good of the public, the public interest in political continuity and the

integrity of state elections, and concerns of federalism and state sovereignty. *See Soules*, 849 F.2d at 1180 (citations omitted). In addition, the court must weigh the fairness of a request that a state election be invalidated in light of Plaintiffs' delay in filing suit until the matter could not be resolved before the alleged violation was well underway.

Here the court returns to the question it posed during oral argument, *viz.*, why the Plaintiffs did not file their claim earlier. Plaintiffs first response, that they filed their claim with the Montana Supreme Court, is inadequate. Plaintiffs simply do not explain their failure to file earlier. Plaintiffs' argument that they did not believe that sufficient signatures would be gathered to put I-137 on the ballot is not credible given the history of the I-122 clean water campaign in 1996 and the response of I-137 as a follow-up petition – not to mention the publicity garnered by the petition gathering itself. Even accepting Plaintiffs' assertion, which this court cannot do, Plaintiffs failed to explain why they did not file their lawsuit immediately when I-137 was certified for the ballot on July 16, 1998.

The court rejects Plaintiffs argument that they did not have standing to challenge I-125 until I-137 was certified for the ballot in July. Certainly Plaintiffs had standing and the matter was ripe as soon as the form of proposed initiative I-137 was approved by the legislative services division of the State of Montana in May, 1998. *See Michigan State Chamber of Commerce v. Austin*, 788 F.2d 1178, 1183 (6th Cir. 1986) (challenge to campaign finance law ripe before ballot initiative qualified for ballot to afford sufficient time for judicial review); *see also American for*

Medical Rights v. Heller, 2 F. Supp.2d 1307, 1313 (D. Nev. 1998) (plaintiffs have standing before initiative qualifies for ballot because injury imminent during petition gathering phase).

It is plain to the court that Plaintiffs knew of the threat directed at their mining activities when petition gathering began in May, 1998. Plaintiffs knew the election would be held in November, 1998. Plaintiff MMA waited until September 1, 1998, to file their lawsuit. Plaintiffs Yellow Band Gold and Majesty Mining waited until November 4, 1998, to file their lawsuit. The I-137 campaign began no later than July 16, 1998. Waiting until September 1, 1998, to challenge I-125 virtually ensured that any problem could not be cured prior to the I-137 election.

In a Fourth Circuit case, the panel stated that "failure to require pre-election adjudication would 'permit, if not encourage, parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action.' " *Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983 (quoting *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973)). In the Ninth Circuit, this has been called "sandbagging." *Soules*, 849 F.2d at 1180.

I do not know whether this occurred here. What I do know, and so find, is that there is insufficient explanation for the delay, and the court must consider this in weighing the equities.

Defendants are unfairly prejudiced by the prospect of having a state election invalidated. Furthermore, the

court is not convinced that Plaintiffs have shown a possibility of irreparable injury or a balance of hardships tipping sharply in their favor such as would justify a preliminary injunction.

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' application for preliminary injunction is DENIED.

The Clerk is directed forthwith to notify the parties of entry of this order.

Done and dated this 18 day of March, 1999.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA MINING ASSOCIATION, NORTHWEST MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, YELLOW BAND GOLD, INC., CONTINENTAL LIME, INC., GOLDEN SUNLIGHT MINES, INC.,

Plaintiffs,

-vs-

ED ARGENBRIGHT, in his official capacity as Montana Commissioner of Political Practices, MIKE COONEY, in his official capacity as Montana Secretary of State,

Defendants,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND, AND CITIZENS FOR I-125,

Defendant-Intervenors.

Civil Docket No. 98-37-H-CCL

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS

Heard in Courtroom No. 551
United States Courthouse
301 South Park
Helena, Montana
October 21 and 22, 1998

BEFORE THE HONORABLE CHARLES C. LOVELL

UNITED STATES DISTRICT JUDGE

* * *

[21] caution in considering whether to interfere with the broad constitutional powers of people to bring initiatives forward on the ballot.

THE COURT: Thank you, Mr. Whyte.

And so the plaintiffs may call their first witness, please.

MR. JOSCELYN: Thank you, Your Honor.

We will call Raymond Lazuk, please.

RAYMOND LAZUK, having been called as a witness on behalf of the plaintiffs, being first duly sworn according to law, was examined and testified as follows:

CLERK OF COURT: Please state your full name and spell your last name.

THE WITNESS: Raymond Lazuk. L-A-Z-U-K.

CLERK OF COURT: Thank you.

You may be seated.

DIRECT EXAMINATION

BY MR. JOSCELYN:

Q Mr. Lazuk, will you state your name and place of residence, please.

A Yes. Raymond Lazuk. I live in Manhattan, Montana.

Q What is your occupation, please.

A I'm environmental and public affairs superintendent at

* * *

[28] MR. COCKRELL: Pardon, Your Honor? I'm sorry. I was visiting with counsel.

THE COURT: You don't expect to examine Mr. Joscelyn's witnesses, I take it?

MR. COCKRELL: No. No, Your Honor, I don't.

THE COURT: You have agreed to submit the witnesses on behalf of all plaintiffs; is that correct?

MR. COCKRELL: Yes. That is correct.

THE COURT: Fine.

Then we'll go directly to Mr. Scheier.

CROSS-EXAMINATION

BY MR. SCHEIER:

Q Good afternoon, Mr. Lazuk.

A Good afternoon.

Q When did you first learn about I-137?

A It was earlier this year. I can't recall the exact month.

Q Was it prior to its qualification for the ballot?

A Yes.

Q Could you give us a ball park estimate of when that was?

A Boy, it was sometime in the spring.

Q When you learned about I-137, did you have concerns about the initiative or the proposed initiative?

A Yes.

[29] Q And did you make any effort at that point to get together with other officers or employees of the corporation to discuss those concerns?

A No.

Q You did not?

A No. Not that I recall.

Q Does Golden Sunlight Mines have a newsletter?

A Yes.

Q And you would agree with me that that's an effective way to communicate with the employees of the corporation?

A Yes.

Q Okay.

Did Golden Sunlight utilize that newsletter to convey its concerns about I-137 to its employees?

A I don't think so.

Q Did Golden Sunlight ever send individual letters to its employees conveying concerns about I-137?

A I don't believe so.

Q Now, you are the environmental and public affairs superintendent at Golden Sunlight?

A Yes.

Q As an individual, you're perfectly free to speak out against I-137; aren't you?

A I'm unsure, due to my affiliation as a – with Golden Sunlight as a salaried employee, part of the management [30] level. I'm not – I'm just not sure. I feel personally that I am. But with the connection with Golden Sunlight, I guess I'm just not sure.

Q Didn't you send a letter to the editor to the Independent Record earlier this week that was published speaking out against I-137?

A Yes.

Q So you felt that you could at least do that, even though you're an employee of Golden Sunlight Mines?

A I felt I could send a letter, yes.

Q And Mr. Joscelyn asked you a question about whether or not Golden Sunlight Mines has a PAC. And I think you indicated it does not. And I think you stated that it does not – It has not created a PAC because Golden

Sunlight does not believe it would be able to generate enough funds to make it worthwhile.

Is that a fair characterization of your testimony?

A Yes.

Q Did Golden Sunlight do a study to determine whether it could create a PAC that would generate sufficient funds to make contributions?

A It was a rudimentary study, just mathematics multiplying the number of employees by what we would expect from a donation.

Q So Golden Sunlight has never had a PAC; is that [31] correct?

A Not to my knowledge.

Q As an individual, you can certainly contribute in opposition to I-137; correct? You would agree with that?

A Yes.

Q You understand that Golden Sunlight could utilize its newsletter and communicate with other employees of Golden Sunlight discussing the pros and cons of I-137, and that that would not be a violation of I-135 – I-125?

A I'm not sure if it would or it wouldn't be a violation.

Q You're not aware of the law that permits communications between members of a corporation?

A No.

Q Okay.

MR. SCHEIER: I have no further questions, Your Honor.

THE COURT: Mr. Motl.

CROSS-EXAMINATION

BY MR. MOTL:

Q Mr. Lazuk, I believe you recognized in your article, did you not, that both sides of the I-137 debate have legitimate points?

A Yes.

Q And Mr. Lazuk, you're not saying, are you, that I-137 should not pass simply because of the arguments that you

* * *

[35] Q And you could, could you not, keep track of that expenditure of time?

A Sure.

Q And you could put a value on that expenditure of time?

A Yes.

Q And it is that value on your part that you believe would be prevented by Initiative 125?

A Yes.

Q Now, Mr. Lazuk, couldn't you simply be reimbursed for that expenditure of time by a ballot committee which was acting in opposition to I-137?

A By what type of a committee, please?

Q A ballot committee?

A If it was lawful to do so, yes.

Q And you would accept my representation that David Owen was indeed, on behalf of the Chamber of Commerce, reimbursed by a ballot committee for an in-kind expenditure or contribution that he made on Initiative 121?

A I don't know the facts, but I would take your word for it.

Q Okay.

That's in evidence before this court. So that would be a vehicle for you, would it not, that you could use?

A Yeah. Once again, if it's a lawful way of doing it, sure.

[36] Q So in fact, using that vehicle, you could speak out as a corporation; couldn't you?

A If it's permissible under I-125.

Q Okay.

And, sir, likewise, you can always speak out as a person; can't you?

A I'd like to think so.

Q And the state talked to you in general about the ability of your company to form a political committee; is that correct?

A I didn't participate in anything like that.

Q Okay.

A But your company hasn't formed a political committee yet, though; has it?

A No.

Q But your company is wholly-owned by another corporation; is it not?

A Yes.

Q And that company is Placer Dome?

A Yes.

Q And is that a corporation?

A Yes.

Q And does that corporation have shareholders?

A Yes.

Q And does that corporation have a political committee?

[37] A I don't know.

Q Have you asked that corporation if they have a political committee that can contribute to a ballot campaign in Montana?

A No, I did not.

Q That would be another vehicle for funds to a ballot campaign in Montana; would it not?

A If it was lawful to do so, sure.

Q Now, are you here, Mr. Lazuk, as the official representative of Golden Sunlight on this issue?

A Yes.

Q And you're here as the – what exactly is your office?

A What is my position?

Q Yes.

A Environmental and public affairs superintendent.

Q And who was your predecessor?

A My predecessor?

Q Who held the position before you had it?

A Oh. That was probably Rick Dale.

Q Okay.

Now, Mr. Lazuk, have we discussed this enough so that you and I can agree that I-125 leaves vehicles, political committees, ballot committees, and it leaves a reimbursement mechanism that your corporation and the people in it can feel free to speak out on I-125?

* * *

[56] Q And shortly after the leak occurred, you filed a lawsuit; did you not?

A No.

MR. MOTL: No further questions, Your Honor.

MR. JOSCELYN: Nothing further of this witness, Your Honor.

THE COURT: Mr. Whyte.

MR. WHYTE: Nothing further, Your Honor.

THE COURT: Very well.

You may step down. Thank you.

Next witness, please.

(Witness excused from the witness stand.)

MR. JOSCELYN: Your Honor, we'd call Ms. Jill Andrews.

JILL ANDREWS, having been called as a witness on behalf of the plaintiffs, being first duly sworn according to law, was examined and testified as follows:

CLERK OF COURT: Please state your full name and spell your last name.

THE WITNESS: Jill Andrews. A-N-D-R-E-W-S.

CLERK OF COURT: Thank you.

You may be seated.

* * *

[64] A Yes. I would be raising money, I would be hiring a consultant, I'd be doing opposition research. I would be – you know, airing TV, radio commercials, I would be placing print media commercials, I would be putting out bumper stickers and signs. And I would build the best grass-roots coalition money could buy.

Q And I assume you'd also be going to civic clubs and other organizations speaking on behalf of the association?

A Yes.

Q And you'd probably try and get individuals to come out in support of the association – or in support or against I-137, rather?

A If I was permitted to do so, I would talk to other associations with like interests and ask them to support me. But I don't believe I can do that under current law.

MR. COCKRELL: I have no further questions, Your Honor.

THE COURT: Cross-examine, Mr. Scheier.

CROSS-EXAMINATION

BY MR. SCHEIER:

Q Good afternoon, Mrs. Andrews.

A Good afternoon.

Q Has the Montana Mining Association used any of the approximately $10,000 that it has in its PAC fund to contribute to the effort to defeat I-137?

[65] A Yes.

Q Approximately how much?

A I would say approximately $9,000.

Q And to whom was that contributed?

A It has not been contributed. It has been spent to do a poll and to prepare some media, assuming it can be placed.

Q And does the Montana Mining Association have a newsletter?

A Yes, it does.

Q Would you agree that a newsletter is an effective means of communicating with the members of an organization?

A It is not only effective communicating with members of the organization, it's effective to communicating to all our other public – other elected officials.

Q Did the Montana Mining Association ever use or utilize its newsletter to communicate to its members concerns about I-137?

A It has not, because our newsletter list is also sent to the media and to our elected officials, and because of past rulings by the Commissioner of Political Practices, we have decided not to put out any more newsletters during a political campaign season.

Q How many members, again, are there of the MMA?

A About 450.

Q Do you have yearly meetings or semiannual meetings?

[66] A We have an annual meeting in the spring and then we have another meeting at our convention and we have periodic board meetings which are usually quarterly.

Q Okay.

During any of those meetings, has there been discussions regarding I-137?

A Yes, there has been.

Q So you've [sic] aware that the members of the association are perfectly free to discuss that during board meetings or meetings of the association?

A Yes.

Q I-125 does not restrict your rights in that respect?

A It doesn't restrict our rights unless we have driven there in a company car or the company is participating in providing any other kind of support.

Q Well, even if you drive to a meeting in a company car, if the meeting consists only of members of the association and it doesn't go beyond that, then you're permitted to do that under I-125; is that your understanding?

A That's my understanding.

Q Now, did the Montana Mining Association ever send individual letters only to its members concerning I-137?

A No.

Q When did the Montana Mining Association form its PAC, its political committee?

* * *

[72] A And I would like to be able to wage an active campaign, and I don't believe that I can.

Q Okay.

Madame, you mentioned that your organization is concerned because of a decision by the Commissioner of Political Practices, is that correct?

A That's correct.

Q Didn't that decision find that your staff on I-122 had failed to report in-kind paid staff time spent working against I-122?

A That's correct.

Q Couldn't your ballot – Couldn't your PAC which has a thousand dollars in it simply reimburse your organization for any paid staff time spent by its staff working against I-137?

A It could. But a thousand dollars doesn't go very far, and there's a lot of work to be done.

Q I thought you testified there was $10,000 at one time in that PAC?

A That's correct.

Q And that would be equivalent to what your organization spent on I-122?

A That's correct.

Q Okay.

And if your organization wished to do more than what

* * *

[74] A We have a lot of retirees.

Q Okay.

Now, you've listed your 23 producer members?

A Correct.

Q Is Cable Mountain a corporation?

A Yes, it is.

Q Of those 23 producer members, how many are not corporations?

A I have one joint venture that I'm sure of. And I have one small miner that I'm not sure how they are structured, but all the rest would be corporations.

Q Now, madame, your – you recognize that in issues like 137, there can be two sides?

A Yes, I do. And I wish I got to tell mine.

Q And you recognize, madame, that the public could choose one side or the other?

A That's correct.

Q So if the public chooses to pass I-137, you would accept their verdict?

A I don't know that I have any alternative. But I would hope that the public would have the right to hear both sides of that question, and they're not hearing that side now.

Q Okay.

Now, madame, going back to you ability to give your side of the story. If I understood what you testified to,

[75] you're concerned that sending your newsletter to individuals other than members may be prohibited by I-125?

A That's correct.

Q And you're agreeing with the commissioner that you can send you newsletter to your members?

A Correct.

Q And the prohibition would be in the cost of sending that newsletter to additional individuals or organizations other than your members?

A I don't understand your question.

Well, the reason you could not send your newsletter to individuals or organizations other than your members, the reason you couldn't, is because that would be an expenditure prohibited by I-125?

A That's correct.

Q Is that correct?

A Yes.

Q Couldn't that expenditure simply be reimbursed by your political committee?

A I'm assuming it can. But I'm also assuming that the information can't be distributed.

THE COURT: Mr. Motl, we're going to take a recess. About 15 minutes, subject to the call of the court.

(The proceedings in this matter were recessed at 3:42 p.m. and reconvened at 3:59 p.m.)

[76] THE COURT: Be seated, please.

You're still under oath, Ms. Andrews.

You may proceed, Mr. Motl.

MR. MOTL: Your Honor, if I could approach the witness for the purpose of having the witness examine Exhibit 801.

THE COURT: Very well.

Q (BY MR. MOTL) Now, Ms. Andrews, you reviewed your files of the Montana Mining Association sufficiently to know if I-122 was an important issue to the Montana Mining Association?

A Yes, I have.

Q And would you agree that it was an important issue?

A Yes.

Q And if you would please turn in Exhibit 801 to the initiative that – the tab that shows the initiative 122 expenditures. And, madame, if you would go – the pages are numbered, the tab has interfered with it, so you need to go to the Montanans for Common Sense Water Laws Opposing 122. You need to go to that section and you need to go where it says contributions, and then I'll represent they're in alphabetical order.

A Okay. I think I have it.

Q Are you in the Ms now as well? They're in alphabetical order so the Montana Mining Association's contribution is [77] listed –

A Yes.

Q Okay.

Would you please find what the Montana Mining Association reported to the Commissioner of Political Practices.

A If I'm on the right line, I believe it's $10,140.29.

Q And can you see what column that's under? That's under monetary; isn't it?

A Yes.

Q That mining association didn't report any in-kind in 1996; did it?

A I don't believe that it did, because one of the first things I did was amend the report and filed one in January, which would have been January of '97.

Q Reporting in-kind?

A Correct

Q Now –

A And I don't believe that the people in the Montana Mining Association understood the rules and regulations of in-kind expenditure.

Q Okay.

But the Montana Mining Association was part of the I-122 coalition – the coalition against I-122; isn't it?

A As I've told you before, I don't have any specific

* * *

[79] A Correct.

Q And in fact, in this case, Montana Mining Association has formed a PAC or has a PAC that it formed a number of years ago that it's used under the circumstances of I-137 wherein board members and other individuals who are members of Montana Mining Association have given money in opposition to I-137?

A Individuals have given money.

Q And that's what I asked?

A Yes.

Q Yes.

And so in effect, Montana Mining Association is using what it can in the initiative process to oppose I-137 as it wishes to do?

A We would go much farther if we were allowed to do so.

Q You have said that.

And I think it was just established that in 1996, for purposes of opposing I-122, the PAC of Montana Mining Association raised $10,000 to give in opposition; is that correct?

A We didn't have a PAC then.

Q Okay.

Ten thousand dollars was given through membership in opposition to I-122?

A That's what the report says. I have no knowledge that [80] it did or did not occur.

Q Okay.

Based on the report, that's what we see; is that correct?

A That's correct.

Q You've testified today that individuals, whether board members or individuals with corporate membership in Montana Mining Association, gave 10,000 – gave up – raised up to $10,000, 9,000 of which you've spent in opposition to I-137; is that correct?

MR. COCKRELL: Objection. That's a misstatement of the record, Your Honor. She testified that individuals; no corporate individual gave any money.

THE COURT: Sustained.

Q (BY MR. WHYTE) The PAC for Montana Mining Association has $10,000, 9,000 of which it has spend in opposition to I-137; is that correct?

A Correct.

Q So it appears that the initiative process as it exists today, including I-125, works the same for Montana Mining Association pre- and post-I-125; wouldn't you say?

A No, I would not.

Q If Montana Mining Association spent $10,000 on I-122 pre-I-125, and spent $10,000 on I-137 post-I-125, how are the expenditures different and how is the initiative process [81] different for you?

A Well, I don't know where the contributions came for the 1996 contribution. But I will bet that they did not come from individuals.

Q Regardless, even though Montana Mining Association raised the $10,000 in two different fashions, it was still the same amount of money pre-I-125 and post-I-125; is that correct?

A Yes.

Q Thank you.

MR. WHYTE: Nothing further.

THE COURT: Redirect.

MR. COCKRELL: Yes, sir. Thank you, Your Honor.

REDIRECT EXAMINATION

BY MR. COCKRELL:

Q Ms. Andrews, I just wanted to clear up a couple of things, because I'm not sure the record's entirely clear.

Mr. Motl, and I'm not sure if Mr. Scheier did, they tossed around the terms ballot committee and separate segregated fund.

If I represent to you those are two different entities, you would agree with that?

A Yes, I would.

Q And is that your understanding that a ballot committee is a political committee?

* * *

[115] collective bargaining agreement?

A That is correct.

Q Thank you.

MR. COCKRELL: I have no further questions, Your Honor.

THE COURT: Any further re-cross?

MR. SCHEIER: No, Your Honor.

MR. MOTL: No, Your Honor.

MR. WHYTE: No, Your Honor.

THE COURT: Very well.

You may step down. Mr. Chorny. Thank you.

THE WITNESS: Thank you, Your Honor.

(Witness excused from the witness stand.)

THE COURT: Next witness, please.

MR. COCKRELL: We call Ms. Tammy Johnson, please, your Honor.

TAMARA J. JOHNSON, having been called as a witness on behalf of the plaintiffs, being first duly sworn according to law, was examined and testified as follows:

CLERK OF COURT: Please state your full name and spell your last name.

THE WITNESS: Tamara, T-A-M-A-R-A, middle Initial J., Johnson. J-O-H-N-S-O-N. T-A-M-M-Y.

* * *

[121] you?

A Well, we certainly do. I mean, we have always taken an active role in speaking for ourselves, but speaking for ourselves and by ourselves certainly isn't enough when we're trying to communicate a message from, say, Alzada to Yaak, you know, it's a pretty big state. And as individuals, there are things that you certainly can do, but it is – it's – you know, it's nowhere near enough to try to communicate the message that needs to be got out.

Q Thank you.

I'm sorry. Go ahead, finish your answer.

A I'm done.

Q Okay.

MR. COCKRELL: I have no further questions, Your Honor.

THE COURT: Cross-examine. Mr. Scheier.

MR. SCHEIER: I have no questions, Your Honor.

THE COURT: Mr. Motl.

CROSS-EXAMINATION

BY MR. MOTL:

Q Ms. Johnson, what type of an organization is Communities for a Greater Northwest?

A Communities for a Great Northwest is organized as a 501(c)(3) organization as recognized by the Internal Revenue Service.

[122] Q And how long has Communities for a Great Northwest been in existence?

A It was founded in 1988.

Q Now, has the mission of Communities for a Great Northwest remained the same during that time?

A Yes, it has.

Q And you would agree, would you not, that Initiative 122 was also an initiative that Golden Sunlight was concerned about?

A Yes, it was.

MR. COCKRELL: Objection, Your Honor. That's beyond the scope of her direct testimony.

THE COURT: It is, but rather than have this witness called back as part of Mr. Motl's case, let's take it now.

Q (BY MR. MOTL) And Ms. Johnson, in fact, you served as a full-time staff person on the anti-I-122 campaign; didn't you?

A Yes, sir, I did. The grass-roots field representative.

Q In the course of that activity, you were paid by Golden sunlight Mine?

A I was not an employee of Golden Sunlight. I had entered into an independent consulting contract with Golden Sunlight Mine to perform work on – for Montanans for Common Sense Water Laws.

[123] Q And while that activity was occurring, I take it you were continuing your membership in Communities for a Great Northwest?

A Yes, sir, I was.

Q And you and the person that you're standing in on behalf of is Mr. Vincent?

A Yes.

Q And you and Mr. Vincent are also engaged as partners, along with several other people, in another group called Environomics?

A Environomics, correct.

Q Okay.

And you would agree, would you not, that Communities for a Great Northwest was active and communicated with the public on issues of concern to it from 1988 to the present time?

A Yes.

Q And you would agree, would you not, that there was nothing about the status of Communities for a Great Northwest which exempted it from any ongoing reporting requirements that would apply to organizations who had an obligation to report political activity?

A Repeat that, please.

Q If Communities for a Great Northwest was engaged in activities which were political and needed to be reported to [124] a proper authority, it would have reported those activities?

A Communities for a Great Northwest has – has never been involved in political activities where it has concerned candidates. It is only issues, issue-oriented things that are related to our membership.

Q But the leaders of Communities for a Great Northwest, yourself, Mr. Vincent, are politically sophisticated people?

A Well, one correction. I'm not a leader of Communities for a Great Northwest. I am a member.

And two, as to other people's sophistication, I don't even know if I can answer about my sophistication.

Q You would agree, Ms. Johnson, that you're aware of the fact that activities in a ballot issue need to be reported?

A Yes.

Q And you will agree that as part of the I-122 campaign, you were able to confirm early on in the campaign that in-kind activities needed to be reported?

A Well, I was able to confirm one type of incident. I certainly don't pretend to be an expert on what is an in-kind contribution.

Q Okay.

But you knew that the payment that you received from Golden Sunlight needed to be reported as an in-kind contribution?

A That's correct.

[125] Q Now, if Communities for a Great Northwest were involved in Initiative 122 in 1996, they would have reported that; wouldn't they?

A Yes. Well, I shouldn't say that. I think that everybody was incredibly fuzzy as to what was reportable and what wasn't reportable. Clearly, if they had directly spent money, they would have understood that that was a reportable contribution. Simply the means of – you know, a communication with their members, I don't believe they would have felt an obligation to report.

Q So the activities in 1996 communication with the members, those would have been obligations or activities that the Communities for a Great Northwest wouldn't have felt an obligation to report?

A That's correct. In – I believe. You know, I can't speak for everybody.

Q And if I understood your testimony earlier, those are the same type of activities that you're concerned about the Communities for a Great Northwest engaging in in 1998?

A It's quite – It's quite a different matter, actually, in comparing 1996 to 1998. Because in 1996, it was an organization that, while certainly had to report certain kinds of activities, it was able to play whatever role that they could within the process.

In 1998, they are unable to play any role in the [126] process. So it's vastly different.

Q Are you saying there was a ballot committee formed in 1996 that had money and there isn't a ballot committee formed in 1998 that has money?

A I'm saying the Communities for a Great Northwest is not entitled to participate at the level that it can, should, or would like to in this – in this election year. In fact, even on – In checking on it, we have been told – our organization has been told that we should cautiously view this the same as a candidate campaign for the time being, because of the action that we're here today in this courtroom for. We simply have been shut out of the process.

Q Communities for a Great Northwest, I believe you testified, has individual members?

A Yes, sir, it does.

Q And what is the budget of the Communities for a Great Northwest?

A You know, I don't know that specifically as a member. I am certainly not the treasurer. I don't know.

Q But you would agree that a portion of that membership revenue comes from dues from individual members?

A Yes, sir.

Q And that money goes into the treasury of that 501(c)(3) organization?

A That's correct.

[127] Q And you would not disagree with me if I represented to you that I just examined the commissioner's reports for Initiative 122, and Communities for a Great Northwest doesn't appear anywhere on that as making an in-kind contribution or a cash contribution in opposition to I-122?

A I would agree with that. But I would like to explain why that is. Because there isn't anything reportable doesn't mean that they didn't communicate with their members; doesn't mean that Bruce didn't feel as an executive director of that organization, that he could go on radio talk shows, or that he could call an elected official or that any other members within that organization, whether corporate or individual, whether a small timber mill, or, you know, Susie down at the corner beauty salon, nobody ever questioned their right to be able to participate. And they certainly never viewed it as – as they need to now, which simply says that they cannot. They're incorporated; they received more than 5 percent of their income from for-profit corporations; and therefore, as we read 125, are unable to participate.

Q And that means now under your understanding that Bruce cannot communicate with the members within his organization?

A I think that that's dicey. I mean, some of the things that happened out of the complaints with 122, there were many organizations that were taken to task for having not [128] reported their newsletters as an in-kind contribution. If the law says a corporation cannot make an in-kind contribution, cannot make an expenditure of any kind, then quite clearly, just the simple matter of reporting that you've made an in-kind contribution doesn't make it right. That's still illegal.

Q And it's your understanding that the commissioner's decision on newsletters meant that you couldn't send your newsletter to your members anymore then?

A I know that there seemed to be some subtleties there but they're subtleties that are difficult to understand. You know, do you have to specifically have paid for a membership to be a member? What about other organizations that you have reciprocal arrangements with? You send me your newsletter without my having to write a check to you for dues, I'll send you mine without having to write a check for dues. We have those kind of organizations all over the United States on our mailing list. Can we do that or not?

Quite honestly, we're not sure, and we're choosing to be safe than sorry.

Q Ms. Johnson, you put together a group called CURE; did you not?

A I – I was involved in that, yes.

Q Wouldn't it be fair to say you were considered a leader of CURE?

[129] A Yes, sir.

Q And isn't it also fair to say that CURE received a substantial portion of its funds from Golden Sunlight?

A At various periods of time, yes. Sometimes it received and sometimes there was other entities but it received money from Sunlight.

Q And you were responsible for determining the nuances of accounting for and properly dealing with the money that CURE received and the activities of CURE?

A No. I was not responsible for the accounting of the money of CURE at all. That was an elected treasurer

who handled that, and there was a board of directors who – who makes a lot of those decisions.

Q CURE was a nonprofit organization?

A Yeah. I guess.

Q And, madame, you were a leader of that nonprofit; weren't you?

A Yes.

Q And you played in a political arena?

A Yes.

MR. MOTL: I am almost finished, Your Honor. I know it's getting late.

Q (BY MR. MOTL) You appeared as a party in lawsuits?

A Yes.

Q You organized rallies?

[130] A Yes.

MR. MOTL: No further questions, Your Honor.

THE COURT: Mr. Whyte.

MR. WHYTE: I have no questions.

THE COURT: Anything further?

MR. COCKRELL: Only a couple, Your Honor.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA CHAMBER OF COMMERCE, SLETTEN CONSTRUCTION COMPANY, LEHRKIND'S, INC., KALISPELL AREA CHAMBER OF COMMERCE, MONTANA HOSPITAL ASSOCIATION, MONTANA FARM BUREAU FEDERATION, MONTANA EDUCATION ASSOCIATION,

Plaintiffs,

-vs-

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices,

Defendant,

and

I-125 PROPONENTS' COMMITTEE,

Defendant-Intervenor.

Civil Docket
No. 97-6-H-CCL

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS

Heard in Courtroom No. 551
United States Courthouse
301 South Park
Helena, Montana
October 13, 1998
9:30 a.m.

BEFORE THE HONORABLE CHARLES C. LOVELL
UNITED STATES DISTRICT JUDGE
Volume 1 of 6

* * *

[174] (Witness excused from the witness stand.)

MR. KALECZYC: Mr. Eric Feaver.

Your Honor, I believe you had indicated that after Mr. Owen had testified, that other potential witnesses could come back into the courtroom.

THE COURT: Yes.

CLERK OF COURT: Come forward and be sworn, please.

Please state your name and spell it.

THE WITNESS: Eric Feaver. E-R-I-C. F-E-A-V-E-R.

CLERK OF COURT: Thank you.

You may be seated.

DIRECT EXAMINATION

BY MR. KALECZYC:

Q Good afternoon, Mr. Feaver.

A Good afternoon.

Q Mr. Feaver, by whom are you employed?

A The Montana Education Association.

Q And what is your position with the MEA?

A President.

Q And how long have you had that position?

A Since 1984.

Q In 1996 and in prior election years, has the MEA made contributions, expenditures in connection with ballot

* * *

[190] Q Now, did you support the six mill levy in 1988?

A Yes, we did.

Q Do you recall how much money you may have contributed from the MEA in support of the six mill levy?

A No, I do not.

Q Have you made a contribution to the six mill levy campaign in 1998?

A Yes, we have.

Q And do you know how much money was contributed?

A We've contributed 5,000 to the six mill levy and an in-kind contribution of a question on a poll regarding voter respondent attitudes toward the six mill levy.

Q When was that $5,000 contribution made, before or after you disincorporated?

A Before we disincorporated.

Q And from what source did that money come?

A Our ballot issue fund.

Q Do you know how much money is left in your ballot issue fund today?

A As of this very moment, $1,000.

Q The in-kind contribution of the question for the poll, do you know the value of that?

A No, I do not know the value of that. It was one question at the end of a very long poll that dealt with CI-75. We do not know what that value would be.

[191] Q So that one dealt with CI-75 not Initiative 113?

A No. One thirteen, the question was do you – Basically, are you going to vote for or against 113? But that question was a tag-on to the end of a far larger, more comprehensive poll around Constitutional Initiative 75.

Q I see.

And from what source will that poll be paid, from dues or some other source?

A That poll was purchased from member dues dollars.

Q And when was that poll conducted in relation to disincorporation?

A After we had disincorporated.

Q Let's talk a little bit about CI-75.

You mentioned that, Mr. Feaver, a couple times in your testimony now.

I take it that the MEA is actively involved in opposing CI-75?

A Yes, we are.

Q And what's the reason for that, sir?

A Our active involvement is that we believe CI-75 significantly challenges our constitution, our representative form of government, local control of public schools, funding of our pension security, the equity of school funding per pupil; that we think CI-75 is a false promise that will not turn Montana into Colorado.

[192] Q How much money, if any, have you contributed to date to the opposition campaign on CI-75?

A To date as I stand before you, we've contributed about $40,000.

Q And when were those contributions made in relation to your date of disincorporation?

A All were made after our unincorporated circumstance.

Q And what was the source of that $40,000?

A Two sources. First, we purchased the poll as MEA and we made the poll results as a – we gave them to Montanans Against CI-75, an organization which we created. Then approximately $27,000 we have paid directly to the Montanans Against VI-75 came from our ballot issue fund. All future expenditures will be from our member dues dollars.

Q From the period when CI-75 was proposed until it qualified for the ballot, was the MEA actively involved in the initiative question at that time?

A Yes, we were.

Q What was the nature of your involvement?

A First, we encouraged folks not to sign.

Q When you say "folks"?

A Our membership.

Q Was there anything else that you did during that time period?

A We promised that if they qualified for the ballot, we

* * *

[198] previously-incorporated organization, you don't have unlimited money then to spend on these ballot issues; do you?

A No, we do not.

MR. KALECZYC: No other questions at this time, Your Honor.

THE COURT: Cross-examine.

Mr. Motl.

MR. MOTL: May it please the court, Your Honor.

CROSS-EXAMINATION

BY MR. MOTL:

Q Mr. Feaver, your primary fear about I-125 was that it would cause retaliation; is that correct?

A Retaliation in what respect?

Q In the form of items like House Bill 575?

A Certainly, 125 did clearly precipitate House Bill 575.

Q But that was your primary concern about I-125?

A No, I don't think that's my primary concern. It certainly is a concern. I don't know if it's the first one of two or three, but it is a concern.

Q And the reason you had that concern is your belief that the corporations, the for-profit corporations, would seek another venue, another way to work to restrict voices of the not-for-profits like they did with House Bill 575?

A Yes. I believe that there could be some retaliation [199] for unincorporated entities.

Q Okay.

And is it partially because of that fear of retaliation that you've chosen to react as strongly as an organization to I-125 as you have?

A No. I think my testimony is pretty clear on this. We've chosen to go the direction – We have unincorporated so that we can continue to be a viable entity in defense and promotion of our members' interests, and ballot issues are our members' interest.

Q But it is true, Mr. Feaver, is it not, that that fight – that business activity that you described is less than 5 percent of your total income?

A Yes. But they aren't, if you will – one doesn't relate to the other in the law. The – And as you know, no attorney at law nor legal counsel advised us that we were exempt. And we did try to seek that information, and since none was forthcoming, we concluded it was too great a risk to presume that we were exempt, and so we unincorporated.

Q And likewise, Mr. Feaver, the membership services, the travel services, and the other provisions of services that you described, those are all items that either – and the selling of space on the floor of your annual convention, those are all services that are associated in some way with your members; aren't they?

[200] A Yes.

Q You're not in the business, you're not a travel agency?

A MEA is not, no.

Q Okay.

And you were aware, were you not, that in the original motions for summary judgment in this case, the documents were filed by the intervenor and by others which in response to your affidavit said that I-125 did not apply to your organization?

A No, I'm not aware of that.

Q Your counsel did not inform you of that?

A No. I know not of what you speak.

Q Now, I think what I heard you saying is that I-125 does not have an effect on how your organization is acting in the 1998 elections?

A Not anymore.

Q Okay.

And I think I also heard you testify that the special ballot fund, political action committee, that you set up was the source of funding for the two $5,000 contributions that you made to ballot committees in 1996?

A Yes, it was.

Q And it was also the source of $17,000 in funding that you made in 1998?

A To this point, that would be in error. We've made [201] $27,000 contribution from that fund, and that fund now is virtually non-existent. And in addition, we spent $10,000 of member dues dollars purchasing a poll to give us the wherewithal to talk about CI-75 with some intelligence.

Q Okay.

Now, would you agree, Mr. Feaver, that the past ballot activity of the Montana Education Association with the exception of 66 and 67 and its counterpart in the '98 election has been in the area of $10,000 or less?

A No. We spent over $30,000 in 1986 in opposition to Initiative 105. And I don't know, I think five or 10,000

in opposition CI-27. And so we have contributed significant dollars on look-alike ballot issues. It's like 105, 66, 67, 75.

Q But in 1998, your contributions would have ranged from about $92,000 to $1,100?

A Nineteen ninety-eight?

Q Yes.

A Our contributions to what?

Q To Ballot Initiative 18, 20, and referendum 106?

A I'm sorry. I don't follow you.

Q Okay.

A In 1998, we're contributing to –

Q Nineteen eighty-eight?

A In 1988? Perhaps you're correct there, sir.

[202] Q Okay.

And again, in 1990 on CI-55, sixteen hundred dollars, and on 111, $10,000; 1993, '92 none. Ninety-four, CI-25, that would be 4,400; and then, of course, the $70,000 on 66 and 67.

You keep your ballot political committee separate from your legislative political committee?

A Yes, it is.

Q And most unions aren't incorporated; are they?

A To my knowledge, only one union in Montana is still incorporated.

Q And that's not your union?

A No, we're no longer incorporated.

Q Okay.

And most unions when they disincorporate, if they're engaged in federal activity, are following the federal PAC laws?

A I don't think most unions ever incorporate.

Q But if they contribute to a campaign for federal office while under the – following the provisions of federal PAC laws?

A They would.

Q And those would apply to your union as well?

A We are not a federal registered campaign committee. We have no federal PAC activity in Montana.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA CHAMBER OF COMMERCE, SLETTEN CONSTRUCTION COMPANY, LEHRKIND'S, INC., KALISPELL AREA CHAMBER OF COMMERCE, MONTANA HOSPITAL ASSOCIATION, MONTANA FARM BUREAU FEDERATION, MONTANA EDUCATION ASSOCIATION,

Plaintiffs,

-vs-

ED ARGENBRIGHT, in his official capacity as Commissioner of Political Practices,

Defendant,

and

I-125 PROPONENTS' COMMITTEE,

Defendant-Intervenor.

Civil Docket
No. 97-6-H-CCL

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS

Heard in Courtroom No. 551
United States Courthouse
301 South Park
Helena, Montana
October 20, 1998
9:15 a.m.

BEFORE THE HONORABLE CHARLES C. LOVELL

UNITED STATES DISTRICT JUDGE

Volume 5 of 6

* * *

[829] Your Honor, we could call Secretary of State, Mike Cooney.

MICHAEL RODMAN COONEY, having been called as a witness on behalf of the defendant-intervenor, being first duly sworn according to law, was examined and testified as follows:

CLERK OF COURT: Would you please state your full name and spell your last name.

THE WITNESS: My full name is Michael Rodman Cooney. C-O-O-N-E-Y.

CLERK OF COURT: Thank you.

You can be seated.

DIRECT EXAMINATION

BY MR. MOTL:

Q Mr. Cooney, would you please restate your name.

A My name is Mike Cooney.

Q And Mr. Cooney, where do you live?

A I reside at 703 Pyrite Court in Helena, Montana

Q And Mr. Cooney, what position, occupation/position do you presently hold?

A I serve as a Secretary of State for the State of Montana

Q And Mr. Cooney, how long have you served as the Secretary of State?

* * *

[884] will that cause the media to stand up and take – give greater attention to that to report both sides?

Q Yes.

A I don't believe that that's a direct cause.

Q You don't? Well, one last question perhaps, Mr. Cooney. Initiative 125 is now in effect today; correct?

A It is.

Q Would you agree with me that in this election year, we're getting less information pro or con about the seven initiatives that we're going to be asked to vote on in two weeks?

A I would say that there are people who are using this dispute that is being currently resolved as a way – They're using this election in an effort to make a statement about I-125 and this trial is what I think.

Q So you think that on the cyanide initiative, for example, where, according to a newspaper report today, the proponents have raised and spent substantially more money than the opponents, that the opponents aren't raising that money just because they want to somehow present a record for this trial?

A I think they're trying to influence this trial. Because as I stated earlier, people who are members of

corporations or who are involved with those corporations who [885] perhaps want to oppose that particular initiative, I believe could on their own contribute to the campaign to oppose that initiative if they so chose to do so.

I have not seen that article, and I can't tell you what the amounts of money are, but I suspect that if they wanted to, this would not be a problem for them.

Q What is the basis of your assumption?

A It's based – Because I base –

Q Just what you believe?

A Not just what I believe, but I've been involved in the fund-raising side of campaigns, and typically, I know that when people want to contribute, they can contribute. And these people who are part of these corporations, there's nothing stopping them if they would decide to do that, so I think it's an effort on their part not to do it.

Q And that would include the hourly employees of corporations that might be affected?

A If they wanted to form a political action committee to do this, they could participate.

Q You think an hourly employee making seven, ten, whatever dollars an hour, that that person ought to be digging into his or her own pocket in order –

A I know a lot of people who are hourly employees, in fact most of – I would say contributors to many of my campaigns are those type of people who dig in their pockets

* * *

(3)

No. 00-1741

Supreme Court, U.S.
FILED
JUN 21 2001
CLERK

In The

Supreme Court of the United States

COMMUNITIES FOR A GREAT NORTHWEST and NORTHWEST MINING ASSOCIATION,

Petitioners,

v.

ED ARGENBRIGHT, COMMISSIONER OF POLITICAL PRACTICES of the State of Montana, and MIKE COONEY, SECRETARY OF STATE of the State of Montana,

Respondents,

and

I-125 PROPONENTS' COMMITTEE, known as LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND, AND CITIZENS FOR I-125,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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41 pp

QUESTION PRESENTED

Whether the district court, after enjoining further enforcement of a Montana campaign finance regulation challenged by petitioners, abused its discretion in determining that petitioners were not entitled to the further, extraordinary relief of setting aside an election that was conducted after the campaign finance regulation had been enjoined.

PARTIES TO PROCEEDINGS BELOW AND CORPORATE DISCLOSURE

The identity of the parties should be clarified as follows. Respondent herein is the I-125 Proponents' Committee, a political committee formed under the laws of Montana. Under Montana law, the name of a political committee set forth in its registration statement includes the names of its major contributors, and thus the I-125 Proponents' Committee is also known as the League of Women Voters of Montana, Montana Common Cause, MontPIRG 2030 Fund, and Citizens for I-125. This is the party referred to by petitioners as "Respondent-Intervenors." Pursuant to Rule 29.6, respondent states that it is not a corporation.

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STATEMENT OF THE CASE

1. In 1996, the voters of Montana approved Initiative 125 ("I-125"), which regulates the types of funds that corporations may spend on ballot measure campaigns. I-125, codified as Mont. Code Ann. § 13-35-227, is designed to assure that the state-created advantages of the corporate form, which allow corporations to accumulate capital and wield enormous economic power, are not deployed to give corporations an unfair, state-conferred advantage in the political marketplace. To that end, I-125 prohibits the use of corporate general treasury funds in ballot measure campaigns, while permitting corporations to participate in such campaigns through the use of segregated funds collected from employees, members and shareholders who wish to support the corporations' political activities. Mont. Code Ann. § 13-35-227.

Under I-125, a corporation may continue to use its general treasury funds to pay for the administration of the segregated fund, including the expenses involved in publicizing the corporation's views to, and soliciting contributions from, the corporation's employees, members and shareholders. Mont. Code Ann. § 13-35-227(3); *see* Tr. 46, 10/21/98 (Testimony of Raymond Lazuk); Tr. 87, 10/21/98 (Testimony of Jill Andrews).[1] Nonprofit corporations formed for the purpose of promoting political ideas are exempt from the restrictions of I-125, so long as they do not engage in business activities, have no for-profit corporate members and no shareholders or other

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[1] "Tr. ___, 00/00/00" refers to the transcript of trial testimony in the district court and the date of the transcript volume. "Ex." refers to the numbered trial exhibits.

affiliated persons with a claim on the corporation's assets or earnings, and do not accept more than 5% of their annual revenue from for-profit corporations. Mont. Code Ann. § 13-35-227(4)(a)-(d).

I-125 was modeled on the Michigan statute at issue in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), in which this Court upheld against First Amendment challenge Michigan's segregated fund requirement for corporate independent expenditures in campaigns for elective office. I-125 also was crafted to comply with this Court's decision in *Federal Election Comm. v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*"), which held that a segregated fund requirement for corporate independent expenditures could not be applied to a nonprofit corporation formed for the purpose of engaging in political, rather than for-profit, activity. The criteria exempting nonprofit corporations from the limitations in Montana's I-125 track those established in *MCFL*. *Compare* Mont. Code Ann. § 13-35-227(4)(a)-(d) *with MCFL*, 479 U.S. at 264. Further factual background on the compelling state interests supporting the adoption of I-125 is set forth in the Petition for Writ of Certiorari in No. 00-1754 (docketed May 24, 2001), at 5-7.

2. After I-125's enactment in 1996, the Montana Chamber of Commerce, together with other corporations, filed suit on February 14, 1997, challenging the constitutionality of I-125 and seeking declaratory and injunctive relief. *Montana Chamber of Commerce v. Argenbright*, No. CV-97-6-H-CCL (D. Mont.) (hereafter, "*Chamber*" case). The suit named the Montana Commissioner of Political Practices, then Ed Argenbright, as defendant (Mr. Argenbright has since been succeeded in that position by

Linda Vaughey). The district court granted leave to intervene to respondent I-125 Proponents' Committee, a political committee formed to support I-125 pursuant to Mont. Code Ann. § 13-37-201. The major contributors to the I-125 Proponents' Committee were the League of Women Voters of Montana, Montana Common Cause, MontPIRG 2030 Fund, and Citizens for I-125.[2]

In April 1998, Montana newspapers reported that I-137, a proposed initiative to ban new cyanide heap and vat leach open pit gold and silver mines, had been submitted to the State of Montana for review. *See Montana Mining Assoc., Inc. v. Mark Siminich*, No. 98-48-H-CCL, Order, March 19, 1999 (D. Mont.), Resp. App. 9. The Secretary of State approved the form of the initiative on May 18, 1998, and it qualified for the November ballot on July 16, 1998. Resp. App. 9. The voters approved I-137 at the November 3, 1998 election, and it was codified at Mont. Code Ann. § 82-4-390.

Opponents of I-137 argued that Montana voters should reject the initiative because it would adversely affect mining companies and employment in Montana. *See, e.g.*, Tr. 24-25, 10/21/98 (Testimony of Ray Lazuk). Under I-125, corporations wishing to fund activities in opposition to I-137 could do so by establishing and

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[2] Under Mont. Code Ann. § 13-37-210(1), the name of a political committee must identify the interests of its major contributors, and the name of the I-125 Proponents' Committee set forth in its organizational statement includes the major contributors listed above. The I-125 Proponents' Committee therefore has sometimes been referred to in these proceedings as the League of Women Voters of Montana, *et al.*

administering segregated funds consisting of donations from employees, shareholders, and individual members, but could not use corporate general treasury funds for such activities. Some opponents of I-137, such as the Montana Mining Association ("MMA"), established a segregated fund in compliance with I-125. Indeed, MMA raised approximately $10,000 through its segregated fund, roughly equal to the amount it had spent to oppose another important mining-related initiative prior to the enactment of I-125, when MMA faced no restrictions on general treasury spending. Tr. 63, 81, 10/21/98 (Testimony of Jill Andrews).

Other opponents of I-137 were exempt from the provisions of I-125 because they were not corporations. For example, Seven-Up Pete Joint Venture, a joint venture of two mining companies that opposed I-137, was free to spend general treasury funds in opposition to I-137 because it was exempt from I-125. Pl. Ex. 88, 89 (correspondence to and from Montana Commissioner of Political Practices confirming that Seven-Up Pete was exempt from I-125); *see* Tr. 452-53, 10/15/98 (Testimony of Ed Argenbright). As of September 1998, Seven-Up Pete had spent $15,452 fighting I-137. Pl. Ex. 809. Individuals who opposed I-137, of course, remained free to contribute and spend their own funds in opposition to the initiative. Tr. 31, 10/21/98 (Testimony of Ray Lazuk).

Still other opponents of I-137, such as petitioners Communities for a Great Northwest ("CGN") and Northwest Mining Association ("NMA"), apparently made no effort to establish a segregated fund for opposition

efforts, as I-125 would have permitted.[3] Both CGN and NMA had individual members who were free to contribute to such a fund. Tr. 126, 10/21/98 (Testimony of Tamara Johnson); Tr. 167-168, 10/22/98 (Testimony of David Rovig) (noting that NMA had many thousands of members). In fact, according to campaign disclosure records maintained by the state, neither CGN nor NMA had ever spent or contributed funds in opposition to any initiative campaign prior to the enactment of I-125, when there was no restriction on their use of general treasury funds for that purpose. Tr. 179-80, 183, 10/22/98 (Testimony of C.B. Pearson, II). The record contains no evidence indicating the amount of funds either petitioner would have spent in opposing I-137 in the absence of I-125's restrictions.

On September 1, 1998, just eight weeks before the election, a group of mining companies and their allied trade associations, including the petitioners herein, filed suit under the First Amendment, alleging that I-125 was unconstitutional as applied to them, and seeking to enjoin further enforcement of I-125. They also sought to enjoin the upcoming election on I-137. *Montana Mining Association v. Argenbright*, No. CV-98-37-H-CCL (D. Mont.) (hereafter, "*Montana Mining* case"). The *Montana Mining* case named Mike Cooney, then the Montana Secretary of State, as well as Mr. Argenbright, as defendants. Mike Cooney

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[3] Petitioners, although organized as nonprofit corporations, include for-profit corporations as members, and derive a substantial portion of their income from donations from for-profit corporations. Pet. App. 74-76. Accordingly, petitioners are subject to the provisions of I-125. Mont. Code Ann. § 13-35-227.

has since been succeeded in office by Robert Brown. The I-125 Proponents' Committee was granted leave to intervene. Pet. App. 33 (Order of September 18, 1998).

The *Montana Mining* plaintiffs, including petitioners, requested that their case be consolidated with the *Chamber* case, which was scheduled for a one-week trial beginning October 13, 1998. *See* Pet. App. 31-33. The plaintiffs agreed that a hearing on their motion for a preliminary injunction against I-137 should be combined with trial on the merits. *Id.* at 31-32. Accordingly, the district court ordered that trial of the *Montana Mining* case would begin immediately following the conclusion of trial on the *Chamber* case. *Id.* All evidence from the *Chamber* case was admitted as part of the record in the *Montana Mining* case. Pet. App. 43. Petitioners did not object to this schedule for consideration of their preliminary injunction motion, although it necessarily meant that no injunction against I-125's restrictions on corporate general treasury spending could issue until the third week of October at the earliest.

3. At the conclusion of the bench trials on October 22, 1998, the district court ruled in favor of the plaintiffs on their First Amendment claim, declaring that I-125 was unconstitutional and enjoining its further enforcement. Pet. App. 36-39. The district court declined to grant the *Montana Mining* plaintiffs' motion for a preliminary injunction against the upcoming vote on I-137. Pet. App. 38-39. The district court issued a written decision and judgments reflecting its rulings on November 20, 1998. Pet. App. 43-60.

On appeal, a divided panel of the Ninth Circuit affirmed the district court's ruling that I-125's restrictions violated the First Amendment, with Judge Michael Daly Hawkins dissenting. The Ninth Circuit also held that the district court did not abuse its discretion in ruling that the *Montana Mining* plaintiffs were not entitled to the unusual relief of setting aside the results of the I-137 election. Pet. App. 20. It rejected as moot the *Montana Mining* plaintiffs' argument that the district court had erred in failing to enjoin the holding of the I-137 election. Pet. App. 19-20.

Respondent I-125 Proponents' Committee and respondent Linda Vaughey, Montana Commissioner of Political Practices, have each filed a petition for writ of certiorari seeking review of the Ninth Circuit's divided ruling on the constitutionality of I-125 (No. 00-1754 and No. 00-1772, respectively). Petitioners herein separately request a writ of certiorari to review the Ninth Circuit's determination that the district court did not abuse its discretion in declining to set aside the results of the I-137 election.

REASONS FOR DENYING THE WRIT

In its separate petition for writ of certiorari in No. 00-1754, respondent herein has explained that the constitutionality of I-125 under the First Amendment presents an unresolved issue of exceptional national importance warranting review by this Court. It does not follow, however, that the instant petition should also be granted.

The instant petition raises only a narrow and unexceptional question of whether the form of relief awarded by the district court reflects an abuse of discretion. The petitioners in this case succeeded in obtaining a permanent injunction against further enforcement of the provisions of I-125 only six weeks after filing their complaint. Pet. App. 38. Thus, the sole question presented by this petition is whether, under the particular circumstances of this case – including the petitioners' failure to commence their lawsuit until eight weeks before the November 1998 election – the district court abused its discretion in declining to award the further extraordinary relief of setting aside the results of the election on I-137. Such a fact-bound, case-specific question, involving routine application of the abuse-of-discretion standard, simply does not present an issue warranting review by this Court.[4]

Contrary to petitioners' contention, the Ninth Circuit's determination that no abuse of discretion occurred here presents no conflict with the decisions of any other

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[4] The petition assumes that the Ninth Circuit correctly decided the important First Amendment question of whether states may restrict the use of corporate general treasury funds to support or oppose a ballot measure, so long as corporations remain free to spend segregated funds raised from interested employees, shareholders and members. Solely for purposes of responding to this petition, respondent indulges the same assumption. As explained in the petitions in No. 00-1754 and No. 00-1772, however, the Ninth Circuit's ruling striking down I-125 conflicts with this Court's decisions in *Austin v. Michigan Chamber of Commerce* and *FEC v. MCFL*. The incorrectness of the Ninth Circuit's decision on I-125, of course, provides an independent reason why petitioners are not entitled to have the I-137 election set aside.

circuits. Instead, the courts of appeals are in agreement that setting aside the results of an election is an extraordinary remedy rarely granted even when actual denial of the franchise is demonstrated – a circumstance obviously not present here. In fact, there is *no* precedent cited by petitioners – and none of which respondent is aware – holding that the results of an election should be set aside following the invalidation of a campaign finance regulation that was in effect during an electoral campaign.

I. The Court of Appeals Followed Settled Law in Declining to Grant the Extraordinary Remedy of Setting Aside Election Results.

The Ninth Circuit broke no new ground in holding that " 'the voiding of a state election is a "drastic if not staggering" remedy.' " Pet. App. 20 (citations omitted). *See, e.g., Gjersten v. Bd. of Election Commissioners*, 791 F.2d 472, 478 (7th Cir. 1986) (invalidating an election is an " 'extraordinary remedy which the courts should grant only under the most extraordinary of circumstances.' ") (citations omitted); *Cook v. Luckett*, 735 F.2d 912, 922 (5th Cir. 1984) (same).

Petitioners incorrectly contend that any finding of a constitutional violation affecting a campaign in any way presumptively entitles a complaining party to an order setting aside the results of an election. Neither this Court's precedents nor those of any lower court establish such a rule. *See, e.g., Connor v. Williams*, 404 U.S. 549, 550 (1972) (if even redistricting plan violated one-person, one-vote requirement of Fourteenth Amendment, court was not required to set aside results of election held

under invalid plan); *Gjersten v. Bd. of Election Commissioners*, 791 F.2d at 478-479 (plaintiffs not automatically entitled to new election even when candidates were unconstitutionally denied access to ballot); *Cook v. Luckett*, 735 F.2d at 922 ("elections will not be set aside absent 'serious voting violations or aggravating factors, such as racial discrimination or fraudulent conduct. . . . ' ") (citations omitted).

The few cases cited by petitioners in which elections were set aside involve actual, systemic denial of the right to vote, or fraudulent conduct affecting the ballot. *See Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) (ordering new election because almost ten percent of qualified electorate had been disfranchised by state officials' refusal to count absentee ballots); *Smith v. Cherry*, 489 F.2d 1098 (7th Cir. 1973) (special election was warranted when electorate was defrauded by conspiracy to place sham candidate on primary ballot).[5]

The extraordinary remedy of invalidating the I-137 election is not remotely justified here, as the Ninth Circuit correctly concluded. Pet. App. 20. There is no allegation that any Montana voter was prevented from casting a ballot on I-137, and there are no special circumstances

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[5] Contrary to petitioners' suggestion, Pet. at 25-26, *Smith v. Cherry* does not establish a Seventh Circuit rule requiring that election results be set aside whenever an irregularity may have affected the results. *See Gjersten v. Bd. of Election Commissioners*, 791 F.2d at 478 (holding that election should *not* be invalidated absent extraordinary circumstances); *Rudisill v. Flynn*, 619 F.2d 692, 694 (7th Cir. 1980) (indicating that *Smith*'s result is confined to "fraud [that] affected 'the face of the ballot' ") (quoting *Smith*, 489 F.2d at 1102).

such as fraud or egregious racial discrimination that could overcome the usual presumption against setting aside election results. Instead, petitioners claim only that there would have been more advertising in opposition to I-137 if corporations could have used their general treasury funds throughout the entire campaign period, rather than using segregated funds raised from interested employees, shareholders and members. No case cited by petitioners, and none of which respondents are aware, has ever set aside an election on the theory that the results may have been affected by an invalid campaign finance regulation. It follows that the denial of such unprecedented relief cannot be an abuse of discretion. Prospective relief against further enforcement of the challenged law, which the district court awarded to petitioners, is a fully adequate remedy for the constitutional violation alleged here.

It is equally clear that there is no conflict among the circuits on the remedial issue presented here. Rather, petitioners merely assemble a number of decisions evaluating the propriety of equitable relief in a variety of different factual circumstances. Pet. at 25-26. The only constant among these decisions is the recognition that setting aside an election is rarely justified. Indeed, the cases cited by petitioners as establishing a conflict with the Ninth Circuit's decision consist primarily of rulings *denying* a request to void or enjoin an election. *See, e.g., Gold v. Feinberg*, 101 F.3d 796 (2d Cir. 1996) (vacating a preliminary injunction that postponed an election); *Hendon v. North Carolina State Board of Elections*, 710 F.2d 177 (4th Cir. 1983) (denying request for recount). Petitioners even rely on *Touchston v. McDermott*, 234 F.3d 1133, 1145

(11th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 749 (2001), disregarding the fact that the passage they cite appears in a dissenting rather than a majority opinion.

Further, the Ninth Circuit's ruling on the remedial issue presented here presents no conflict with this Court's First Amendment decisions cited at pp. 11-14 of the Petition. None of these decisions holds that the invalidation of a campaign finance regulation requires a court to set aside an election partially conducted while the regulation was in place.

II. Petitioners' Effort to Establish an Abuse of Discretion on the Question of Remedy Misrepresents the Nature of I-125 and the Record Below.

Petitioners' filing is replete with allegations that I-125 constituted a "gag rule" forbidding citizens to express opposition to I-137. These allegations misrepresent both the nature of I-125 and the record below.

I-125 did not bar the petitioners from opposing I-137. Under I-125, corporations may establish segregated funds for that purpose, just as they may establish PACs that contribute to candidate elections. They may use general treasury funds to pay for solicitations to their members, shareholders, and employees seeking donations to the segregated fund and to communicate their views on an initiative to those same individuals. Tr. 465, 10/15/98 (Testimony of Ed Argenbright). Corporate officers are free to participate in the management of the segregated fund. Tr. 485 (Testimony of Ed Argenbright). Further, corporate officers can continue to advocate the corporation's position on an initiative so long as any work done

on behalf of the corporation is paid for out of the segregated fund. Tr. 1002, 10/20/98 (Testimony of C.B. Pearson, II); Tr. 191, 10/22/98 (Testimony of C.B. Pearson, II). It is thus wholly inaccurate to contend that a corporation's segregated fund does not give the corporation a voice in initiative campaigns.

As far as the record discloses, the petitioners made no effort to establish segregated funds for spending on initiative campaigns. The failure of petitioners to take advantage of available avenues of expression permitted by I-125 substantially undermines their claim of suppressed speech in the I-137 campaign. The record, in fact, contains no hint of the amounts that either petitioner would have spent on the I-137 campaign in the absence of I-125's restrictions. This is perhaps not surprising, because neither petitioner had any record of spending funds on any Montana initiative campaign even before I-125 was enacted. Tr. 179-80, 183, 10/22/98 (Testimony of C.B. Pearson, II). This was true even though previous initiatives, such as I-122, a clean water initiative, were strongly opposed by mining companies. Tr. 76-77, 10/21/98 (Testimony of Jill Andrews).

A member of petitioner CGN incorrectly claimed at trial that I-125 prevented its members and officers from speaking out individually against I-137. Tr. 126-28, 10/21/98 (Testimony of Tamara Johnson). I-125 contains no such prohibition. CGN member Tamara Johnson's uncertainty as to what kinds of advocacy CGN, its officers, and its members could engage in arose out of confusion about what constitutes an in-kind contribution by a corporation. *See* Tr. 124-28, 10/21/98 (Testimony of Tamara Johnson). I-125, however, did nothing to change the

definition of or reporting requirements for in-kind contributions. Tr. 470, 10/15/98 (Testimony of Ed Argenbright). Corporations were already required to disclose any in-kind contributions they made when their officers participated in ballot campaigns on behalf of the corporation, even before I-125 was enacted. I-125 merely requires that, if a corporate officer participates in a ballot campaign *as an employee of the corporation*, the value of the in-kind contribution (such as the officer's salaried time) must be reimbursed from the segregated fund that I-125 allows. Tr. 1002, 10/20/98 (Testimony of C.B. Pearson, II); Tr. 191, 10/22/98 (Testimony of C.B. Pearson, II).

Furthermore, I-125 did not prevent a corporate officer or member from speaking out against I-137 in his or her individual capacity. Indeed, Ms. Johnson, CGN's only witness at trial, organized a public rally against I-137. Tr. 40-41, 10/21/98 (Testimony of Ray Lazuk). Corporate officials such as Ray Lazuk, the Environmental and Public Affairs Superintendent of plaintiff Golden Sunlight Mines, attended the rally. *Id.* Mr. Lazuk also obtained publication, in a Montana newspaper, of a letter to the editor speaking out against I-137. Tr. 30, 10/21/98 (Testimony of Ray Lazuk); *see also* Tr. 48, 10/21/98 (Testimony of Ray Lazuk).

A number of plaintiffs' witnesses acknowledged that their corporations had failed to take advantage of options that remained open to them under I-125. Ray Lazuk testified that Golden Sunlight Mines never so much as wrote a letter to its employees informing them about I-137 or asking for their support in opposing it, all of which is perfectly permissible under I-125. Tr. 29, 10/21/98. Lazuk's company did not establish a segregated fund, nor

did it ask its parent company, Placer Dome, whether the parent company had segregated funds available for opposition efforts. Tr. 36-37, 10/21/98 (Testimony of Ray Lazuk). The company did not even include any mention of I-137 in the regular employee newsletter. Tr. 29, 10/21/98 (Testimony of Ray Lazuk). Montana's Secretary of State, Mike Cooney, observed that corporations appeared to be deliberately avoiding lawful means of participating in 1998 ballot campaigns to improve their litigation position in the I-125 lawsuit. Tr. 884-885, 10/20/98 (Testimony of Secretary of State Mike Cooney).

Furthermore, the plaintiffs below who did make an effort to raise funds within the constraints of I-125 had a remarkable degree of success, considering that 1998 was the first election season governed by I-125. For example, prior to I-125, the Montana Mining Association spent $10,140 opposing I-122, a water quality initiative that the MMA considered very important to its members. Tr. 76-77, 10/21/98 (Testimony of Jill Andrews). After the enactment of I-125, MMA established a ballot measure PAC that had already raised over $10,000 to oppose I-137 by the time of trial. Tr. 63, 10/21/98 (Testimony of Jill Andrews).

Similarly, the Montana Education Association ("MEA") established a ballot issue PAC that in 1998 gave a total of $32,000 to two ballot issue campaigns concerning taxation issues. Tr. 190, 192, 10/13/98 (Testimony of Eric Feaver). This may be compared to MEA's expenditures on ballot measure campaigns from 1990 through

1996, before I-125 was enacted: in all but one of those years, MEA's ballot campaign spending was less.[6]

In contending that I-125 "muzzled" opposition to I-137, petitioners also ignore the fact that non-corporate opponents of I-137, including individuals and partnerships, remained free to spend unlimited amounts to oppose the initiative. For example, Seven-Up Pete Joint Venture, a joint venture of two mining companies that opposed I-137, had spent $15,452 fighting I-137 as of September 1998, two months before the election. Pl. Ex. 809; *see* Tr. 452-53, 10/15/98 (Testimony of Ed Argenbright).

Given the substantial opportunities for opposing I-137 that I-125 left open, I-125 clearly did not deprive the public of the opponents' viewpoint. The district court's statement that the corporate voice was "silenced" by I-125 was not binding on the Ninth Circuit or this Court, because it was based on an incorrect understanding of the law. As this Court held in *Austin*, a corporation's ability to use segregated funds for political expenditures means that the corporation's voice is *not* being silenced. 494 U.S. at 660 (noting that Michigan's statute "does not impose an absolute ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds.") Similarly, in *MCFL*, this Court noted that a requirement of

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[6] *See* Tr. 202, 10/13/98 (Testimony of Eric Feaver) (in 1990, MEA spent $1,600 on CI-55 and $10,000 on I-111; in 1992 and 1993, MEA made no expenditures on ballot measures; in 1994, MEA spent $4,400 on CI-25 and a combined total of $70,000 on CI-66 & 67).

using segregated funds "is of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in *First National Bank of Boston v. Bellotti.*" 479 U.S. at 259 n.12. The district court never discussed *Austin*'s or *MCFL*'s holdings on this point. The Ninth Circuit was not required to defer to findings based on a misapprehension of the governing law. *Bose Corp. v. Consumers Union of the United States*, 466 U.S. 485, 501 (1984). In addition, given the evidence summarized above, the district court's finding was clearly erroneous as a factual matter.

Finally, the petitioners' delay in filing suit also weighs against their demand to set aside the election. The district court enjoined further enforcement of I-125 only six weeks after petitioners filed their lawsuit, with eleven days still remaining prior to the November 3, 1998 election. Petitioners' failure to obtain an injunction against I-125 at an earlier point in the I-137 campaign is entirely the result of their decision to wait until September 1, 1998 to file suit, and their subsequent agreement that the hearing on their claims should commence following the conclusion of the *Chamber* case. Given that signature-gathering for I-137 began in April 1998, *see* Resp. App. 9, petitioners clearly could have sought injunctive relief against I-125 at an earlier point in the election cycle.

For all these reasons, the district court did not abuse its discretion in denying petitioners' request to set aside the results of the I-137 election.

III. Any Contention that the District Court Erred in Failing to Enjoin the I-137 Election is Moot.

The petition suggests that, in addition to determining whether the I-137 election should be set aside, this Court should determine whether the I-137 election should have been enjoined. *See* Pet. at 28-29. This Court, however, lacks subject-matter jurisdiction to address that question, because, as the Ninth Circuit noted, the question is moot. Pet. App. 19-20; *see Hall v. Beals*, 396 U.S. 45 (1969) (challenge to residency requirement for voter registration was moot where election had already passed and plaintiff was eligible to vote in next election). The election on I-137 has already been held, and in future initiative elections petitioners would be protected by the permanent injunction against I-125 that was entered by the court. Accordingly, no exception to the mootness doctrine is available here, and this Court lacks jurisdiction to determine whether I-137 should have been enjoined. *See generally Preiser v. Newkirk*, 422 U.S. 395, 401-402 (1975).

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Court deny the petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

* * *

MONTANA MINING ASSOCIATION, Inc., a non-profit corporation; MAJESTY MINING, INC., a Montana corporation, and YELLOW BAND GOLD, INC., a Montana corporation,

Plaintiffs,

-v-

MARK SIMONICH, in his official capacity as Director of the Montana Department of Environmental Quality; JOSEPH GERBASE, RUSSELL HUDSON, KIM LACEY, DAN DENNEHY, ROGER PERKINS, GARON SMITH, and JOHN DOE, all in their official capacities as members of the Montana Board of Environmental Review; MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY and

CV 98-48-H-CCL

ORDER

(Filed Mar. 19, 1999)

MONTANA BOARD OF ENVIRONMENTAL REVIEW,

Defendants,

and

MONTANA ENVIRONMENTAL INFORMATION CENTER; MONTANANS FOR COMMON SENSE MINING LAWS – FOR I-137; and MONTANA COUNCIL OF TROUT UNLIMITED,

Defendant-Intervenors.

* * *

Before the court is Plaintiffs' motion for preliminary injunction. Oral argument was heard on January 22, 1999, and post-argument briefing was completed on February 8, 1999. The court, having heard the arguments of the parties and having considered the briefs, is prepared to rule.

Procedural Background

Plaintiffs filed their original complaint on November 4, 1998. By their complaint, Plaintiffs seek declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202. The focus of Plaintiffs' complaint is November 3, 1998, passage of a Montana ballot initiative, Initiative 137

("I-137"), which prohibits cyanide leach processing at any new open-pit gold and silver mines or expansions to existing mines. Plaintiffs argue that I-137 is unconstitutional and that its passage violated their constitutional right to procedural and substantive due process. Plaintiffs filed their Fourth Amended Complaint on February 2, 1999.

In a related case, one of the Plaintiffs, Montana Mining Association ("MMA"), had also filed a complaint[1] on September 1, 1998, challenging the constitutionality of Initiative 125 ("I-125"), which had been passed by Montana voters in 1996. MMA complained that I-125 violated its First Amendment right to free speech in the political arena because it prohibited corporate contributions to ballot initiative campaigns. MMA also complained that it was being prevented by I-125 from campaigning against I-137 in the 1998 election cycle. The court consolidated trial on the merits in MMA's I-125 suit with the trial pending in another case[2] challenging the constitutionality of I-125. On October 22, 1998, after hearing closing arguments in the MMA trial challenging I-125, the court ruled from the bench. The court decided that I-125 was unconstitutional and enjoined the State of Montana from enforcing it against the MMA during the I-137 ballot initiative campaign, of which there were eleven days remaining. Based on the testimony presented at trial, the

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[1] *Montana Mining Association, et al. v. Argenbright, et al.*, CV 98-37-H-CCL.

[2] *Montana Chamber of Commerce, et al. v. Argenbright, et al.*, CV 97-6-H-CCL. The October 13, 1998, trial date had been set on April 22, 1998.

court also found that many factors influence election outcome, particularly the political values, predispositions, and party loyalty of the voters, and that neither money nor media advertising is the sole or even the single most important variable controlling election outcome. Thus, the court decided MMA's constitutional challenge to I-125 approximately seven weeks after MMA filed its complaint.

Legal Standard for Preliminary Injunction

> "In this circuit, the test for granting a preliminary injunction is whether a party has demonstrated: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation, and the balance of hardships tips sharply in favor of the party seeking relief."

Marbled Murrelet v. Babbitt, 83 F.3d 1068, 1073 (9th Cir. 1996) (*citing Sierra Club v. Marsh*, 816 F.2d 1376, 1382 (9th Cir. 1987)). In addition, when the public interest is involved, the court must examine whether the public interest favors the preliminary injunction applicant. *Fund for Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992) (*citing Caribbean Marine Serv. Con. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988)). When the subject of the proposed preliminary injunction is a law enacted for protection of the public interest, the applicant may be held to a higher standard of showing a likelihood of success on the merits of the claim. *See Toy Mfr. of America, Inc. v. Blumenthal*, 806 F. Supp. 336, 340 (D. Conn. 1992), *aff'd* 986 F.2d 615 (2nd

Cir. 1993). Because injunctive relief is an equitable remedy, the court may consider an equitable defense such as laches in determining whether to exercise its equitable powers. *Banks v. Bd. of Educ.*, 659 F. Supp. 394, 397-98 (C.D. Ill. 1987).

Discussion

Plaintiffs seek an order enjoining the State of Montana from enforcing I-137, which prohibits new permits for cyanide heap leach processing. Plaintiffs assert that they have shown serious questions on the merits of their claims because the 1998 election process was fundamentally flawed due to the operation of I-125 (prohibiting corporate contributions to ballot issue election campaigns), and that this fundamental flaw violated Plaintiffs' right to substantive due process. Plaintiffs acknowledge that the court struck down I-125 on October 22, 1998, leaving eleven days to campaign without the prohibitions imposed by I-125, but Plaintiffs claim that this was insufficient time for them to conduct a successful opposition campaign.

Plaintiffs analogize their circumstances to those of the plaintiffs in *Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998) (state election procedures for vote counting did not violate substantive due process), *Duncan v. Poythress*, 657 F.2d 691 (5th Cir. 1981), *cert. denied*, 459 U.S. 1012 (1982) (state's refusal to hold special election deprived voters of constitutional right to fill judgeship vacancy), and *Griffin v. Burns*, 570 F.2d 1065, 1077 (1st Cir. 1978) (state's retroactive invalidation of absentee and shut-in ballots for primary election violated due process).

Those cases discuss a federal court's power to invalidate a state election when the state's electorate is disenfranchised. Here, Plaintiffs argue that because the Montana electorate was deprived of Plaintiffs' full and complete (albeit hypothetical) opposition campaign, the Montana electorate was completely disenfranchised in the November 1998 election. Plaintiff Yellow Band Gold raises the possibility of irreparable injury by asserting that a delay on its permit application could jeopardize its existence as a business.

Upon being questioned by the court regarding the reason for MMA's delay in waiting to file its I-125 challenge on September 1, 1998, counsel for MMA stated that I-137 was not certified for the ballot until July 16, 1998. After certification, Plaintiffs brought a petition for relief before the Montana Supreme Court and waited approximately one month for that court to decide the petition. One week after that petition was denied, Plaintiffs filed both the instant lawsuit and a similar lawsuit in state district court.

Defendant State of Montana ("Montana") argues that Plaintiffs have not demonstrated a likelihood of success on the merits. Montana also asks the court to balance the equities by considering Plaintiffs' unjustified delay in filing their complaint.

Montana also questions the propriety of the remedy sought by Plaintiffs. Montana points out that the constitutional violation complained of was caused by I-125. This court struck down I-125 eleven days before the I-137 election. Montana argues that the appropriate remedy for the finding that I-125 was invalid was to strike down

I-125, not to throw out another law (I-137) merely because it was enacted following a campaign during which I-125 was partially in effect.[3]

From Montana's point of view, to throw out I-137 because I-125 was unconstitutional severely penalizes the Montana citizens who voted on I-137 and essentially gives the I-137 election to Plaintiffs as compensation for the I-125 constitutional violation.

Finally, Montana contends that there was no disenfranchisement of Montana voters in the I-137 election. A voter information pamphlet was mailed to the home of every registered voter, explaining the elements of I-137 in a balanced fashion and providing both a proponents' and an opponents' view of the measure. No Montana voter was prevented from voting in the I-137 election. There was no procedural irregularity in the election process itself. Defendant Montana argues that ultimately there is no way for Plaintiffs to prove that the I-125 prohibitions in effect until October 22, 1998, affected the outcome of the I-137 election on November 3, 1998.[4]

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[3] The court notes that the Supreme Court case cited by Plaintiffs in oral argument, *Buckley v. American Constitutional Law Foundation*, 1999 WL 7723 (Jan. 12, 1999), accords with Defendant Montana's argument because it was the offending Colorado statutes regulating the petition process that were struck down as unconstitutional, not the laws enacted during the time period when petition regulations were still in effect.

[4] *Griffin v. Burns*, 570 F.2d at 1079-80, briefly touches on this issue, stating that the outcome test may be applied to determine whether an election was controlled by an invalid process and judicial intervention is warranted, but that mathematical precision is not required.

For all of these reasons, Defendant Montana argues that Plaintiffs' likelihood of success on the merits of their due process claim is minimal and inadequate to meet the threshold requirement for the issuance of a preliminary injunction. As for the threat of irreparable injury to Plaintiffs Yellow Band Gold and Majesty Mining, Montana's position is that any injury found by the court can be compensated by Defendant Montana under Plaintiffs' Fifth Amendment takings claim. Finally, Defendant Montana asserts that the court should consider the equitable defense of laches when determining Plaintiffs' application for preliminary injunction.

Laches

The court has raised *sua sponte* the potential application of the equitable defense of laches to the application for preliminary injunction. The parties have provided supplemental briefing on the point, Plaintiffs arguing that laches is not applicable, and Montana and Defendant-Intervenors arguing that laches is available to them as a complete defense to the application for preliminary injunction.

The relevant facts are as follows. The constitutionally infirm I-125 measure was passed by Montana voters in November, 1996, and it prohibited corporations from contributing to ballot initiative campaigns. On February 18, 1998, this court set down trial in the *Montana Chamber v. Argenbright* case (which challenged I-125) for May 18, 1998. On joint stipulation and motion of the parties to that case, the court vacated the trial date on April 22, and

reset the *Montana Chamber* trial for October 13, 1998. But for the parties' request, the case would have been tried and decided in the spring of 1998.

In mid-April, Montana newspapers reported that a proposed ballot initiative to prohibit cyanide heap leach open-pit mining had been submitted to the State of Montana for review. On May 18, 1998, the Montana Secretary of State approved the form of that initiative, a fact which was reported by the Montana press. The I-137 proponents began circulating signature petitions the next day. On May 24, 1998, the Montana press also reported the issuance of an opinion by the Commissioner of Political Practices in response to a query from the Seven-Up Pete Joint Venture (developers of a proposed open-pit gold mine) regarding the application of I-125 campaign prohibitions to it vis-a-vis the I-137 opposition campaign. On July 16, 1998, the Montana Secretary of State certified that the requisite number of signatures had been gathered to place I-137 on the ballot in the November 3 election. On November 3, 1998, a majority of the Montana electorate voted in favor of I-137.

Plaintiffs claim that they did not believe that the requisite number of signatures would be gathered until July 16, 1998, and that furthermore they would not have had standing to challenge I-125 until I-137 was certified on July 16.

Defendant-Intervenors argue that Plaintiff MMA was not diligent in filing its challenge against I-125. The MMA lawsuit was not filed until eight weeks before the election. Despite this late challenge, the court did try MMA's case, and the court found I-125 unconstitutional with

almost two weeks of the I-137 campaign remaining. Defendant-Intervenors assert that they need only show that Plaintiffs' delay was unreasonable and resulted in prejudice to the Defendant. *Knox v. Milwaukee Bd. of Elections Comm'rs*, 581 F. Supp. 399, 402 (E.D. Wis. 1984).

Laches can be used to bar a plaintiff's claim entirely, *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990), or simply to deny temporary injunctive relief, *Banks v. Bd. of Educ.*, 659 F. Supp. 394 (C.D. Ill. 1987). Once lack of diligence is established, it becomes plaintiff's burden to justify the delay. *PAC for Middle America v. State Bd. of Educ.*, 1995 WL 571887, *3 (N.D. Ill. Sept. 22, 1995). When plaintiffs do not assert a timely preelection challenge, "they will be barred from the equitable relief of overturning the results of the election." *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988). This is so because the voiding of a state election is considered to be a "drastic if not staggering" remedy. *Id.* at 1180 (quoting *Bell v. Southwell*, 376 F.2d 659, 662 (5th Cir. 1967)).

In summary, Defendant-Intervenors conclude that the length of Plaintiff MMA's delay is serious, that Plaintiffs have advanced no reasonable excuse for the delay, and that the delay has had the prejudicial effect of allowing an entire election to be thrown into question, which is a direct threat to political continuity based on the finality of elections. Here, Defendant-Intervenors argue that the heart of laches "is not, like [a statute of limitations], a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced. . . . " *Holmber v. Armbrecht*, 327 U.S. 392, 396 (1946) (quoting *Galliher v. Caldwell*, 145 U.S. 368, 373 (1892)).

Defendant-Intervenors point out that the offending campaign law was passed in 1996, and that Plaintiff MMA waited until September 1, 1998, to challenge the application of that campaign law to a November, 1998 election. Defendant-Intervenors charge that Plaintiff MMA delayed suit for five months after the I-137 ballot initiative process was underway and had been publicized in the Montana press, leaving virtually no time for this court to determine the issue before the campaign. Defendant-Intervenors challenge Plaintiff MMA's excuse that it did not believe that the I-137 proponents would be able to gather enough signatures for the ballot as being a weak excuse, given the historical context of the I-137 issue and the publicity attendant to it. Moreover, this excuse offers no justification whatsoever for Plaintiff MMA's six-week delay after certification of I-137 for the ballot.

Defendant Montana also argues that the defense of laches should bar Plaintiffs' request for preliminary injunction as a result of Plaintiffs' unexcused delay. Defendant Montana also cites *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (9th Cir. 1988), a case wherein plaintiffs filed a suit two months after a special initiative election was held. The plaintiffs in *Soules* claimed that the decision to hold the special election involved an Equal Protection Violation, but the district court and the appellate panel agreed that laches barred plaintiffs' claim because they "knew the basis for their alleged equal protection challenge well in advance of the proposed special election and . . . failed to explain

adequately their failure to press the claim before the election." *Id.* at 1182.[5]

Montana asserts that in this case Plaintiffs likewise knew the basis for their constitutional claim well in advance of the November, 1998, election, yet failed to press the claim in sufficient time before the election to allow for any remedy other than voiding the election. Montana asserts that Plaintiffs' unexcused delay, given the remedy sought, results in extreme prejudice to Montana's voters and to the state electoral process.

Montana argues that it is not enough merely to file a pre-election complaint, but that the party challenging the election must timely file a pre-election complaint, *i.e.*, leaving sufficient time to cure the problem before the election. Montana cites *Barthelmes v. Morris*, 342 F. Supp. 153 (D. Md. 1972), wherein a district court decided that plaintiffs' request for an injunction against the election of delegates to the Democratic National Convention was barred by laches because plaintiffs had waited until less than eight weeks before the election to file their lawsuit.

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[5] The Ninth Circuit panel in *Soules* notes that there is a line of cases holding that parties challenging state election procedures must bring their complaints before the election, not after, unless there is no opportunity for preelection filing. *Soules*, 849 F.2d at 1180. Failure to file a preelection complaint that allows the problem to be cured before the election justifies the application of laches as a complete bar to the equitable relief of invalidating the election. *Id.* (citing *Chinese for Affirmative Action v. Leguennec*, 580 F.2d 1006, 1008 (9th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1979); *United States v. City of Cambridge*, 799 F.2d 137, 141-42 (4th Cir. 1986); *Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 188-83 (4th Cir. 1983); *Hart v. King*, 470 F. Supp. 1195, 1198 (D. Haw. 1979)).

Id. at 159-61. Montana concludes that had Plaintiffs filed a timely pre-election challenge, the constitutional problems of the I-137 campaign could have been cured prior to the conclusion of that campaign.

Analysis

This court regards a preliminary injunction as a serious matter, "a very far reaching power never to be indulged in except in a case clearly warranting it." *Sierra Club v. Hickel*, 433 F.2d 24, 33 (9th Cir. 1970). In this case, the court must balance the constitutional violation alleged by Plaintiffs and the requested remedy of invalidation of a state election, with the good of the public, the public interest in political continuity and the integrity of state elections, and concerns of federalism and state sovereignty. *See Soules*, 849 F.2d at 1180 (citations omitted). In addition, the court must weigh the fairness of a request that a state election be invalidated in light of Plaintiffs' delay in filing suit until the matter could not be resolved before the alleged violation was well underway.

Here the court returns to the question it posed during oral argument, *viz.*, why the Plaintiffs did not file their claim earlier. Plaintiffs first response, that they filed their claim with the Montana Supreme Court, is inadequate. Plaintiffs simply do not explain their failure to file earlier. Plaintiffs' argument that they did not believe that sufficient signatures would be gathered to put I-137 on the ballot is not credible given the history of the I-122 clean water campaign in 1996 and the response of I-137 as a

follow-up petition – not to mention the publicity garnered by the petition gathering itself. Even accepting Plaintiffs' assertion, which this court cannot do, Plaintiffs fail to explain why they did not file their lawsuit immediately when I-137 was certified for the ballot on July 16, 1998.

The court rejects Plaintiffs argument that they did not have standing to challenge I-125 until I-137 was certified for the ballot in July. Certainly Plaintiffs had standing and the matter was ripe as soon as the form of proposed initiative I-137 was approved by the legislative services division of the State of Montana in May, 1998. *See Michigan State Chamber of Commerce v. Austin*, 788 F.2d 1178, 1183 (6th Cir. 1986) (challenge to campaign finance law ripe before ballot initiative qualified for ballot to afford sufficient time for judicial review); *see also American for Medical Rights v. Heller*, 2 F. Supp.2d 1307, 1313 (D. Nev. 1998) (plaintiffs have standing before initiative qualifies for ballot because injury imminent during petition gathering phase).

It is plain to the court that Plaintiffs knew of the threat directed at their mining activities when petition gathering began in May, 1998. Plaintiffs knew the election would be held in November, 1998. Plaintiffs MMA waited until September 1, 1998, to file their lawsuit. Plaintiffs Yellow Band Gold and Majesty Mining waited until November 4, 1998, to file their lawsuit. The I-137 campaign began no later than July 16, 1998. Waiting until September 1, 1998, to challenge I-125 virtually ensured that any problem could not be cured prior to the I-137 election.

In a Fourth Circuit case, the panel stated that "failure to require pre-election adjudication would 'permit, if not encourage, parties who could raise a claim to lay by and gamble upon receiving a favorable decision of the electorate and then, upon losing, seek to undo the ballot results in a court action.' " *Hendon v. North Carolina State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983 (quoting *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973)). In the Ninth Circuit, this has been called "sandbagging." *Soules*, 849 F.2d at 1180.

I do not know whether this occurred here. What I do know, and so find, is that there is insufficient explanation for the delay, and the court must consider this in weighing the equities.

Defendants are unfairly prejudiced by the prospect of having a state election invalidated. Furthermore, the court is not convinced that Plaintiffs have shown a possibility of irreparable injury or a balance of hardships tipping sharply in their favor such as would justify a preliminary injunction.

Accordingly,

IT IS HEREBY ORDERED that Plaintiffs' application for preliminary injunction is DENIED.

The Clerk is directed forthwith to notify the parties of entry of this order.

Done and dated this 18 day of March, 1999.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States
District Judge

Supreme Court, U.S.
FILED
JUL 3 2001
OFFICE OF THE CLERK

No. 00-1741

In The

Supreme Court of the United States

COMMUNITIES FOR A GREAT NORTHWEST and NORTHWEST MINING ASSOCIATION,

Petitioners,

v.

ED ARGENBRIGHT, COMMISSIONER OF POLITICAL PRACTICES of the State of Montana, and MIKE COONEY, SECRETARY OF STATE of the State of Montana,

Respondents,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND, and CITIZENS FOR I-125,

Respondents-Intervenors.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY TO RESPONDENTS' OPPOSITIONS TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

The Petitioners here are Communities for a Great Northwest and Northwest Mining Association (collectively, "the Communities"). There are two distinct groups of Respondents: one consists of the Montana Commissioner for Political Practices and the Montana Secretary of State ("State Respondents");[1] the other consists of various outfits that supported both the gag law (I-125) and the mining initiative (I-137) ("Private Respondents"). Each group of Respondents filed an opposition to the Communities' petition, to which the Communities reply in this single brief, referring to both groups collectively as "Respondents."

The bulk of Respondents' briefs is devoted to rehashing Judge Lovell's factual determination that the Communities' political speech was silenced. *E.g.* State Resp. 7, 10; Pvt. Resp. 12-15. Such armchair retrials have no place in this Court, especially given that the finder of fact rejected the testimony on which Respondents rely. Moreover, closer inspection of that testimony reveals that Judge Lovell was correct: the gag law suppressed speech. It was therefore unconstitutional. As a result, because the unconstitutional gag law tainted the referendum on the mining initiative, adoption of the mining initiative too is unconstitutional. *Certiorari* is necessary to consider this doubled-barrel assault on the First Amendment.

As for legal arguments, Respondents begin with the fallacious assumption that the Communities seek review of Judge Lovell's refusal to invalidate an election that had occurred already. State Resp. 5; Pvt. Resp. 8. In reality, however, the petition clearly states, and it is quite apparent from the procedural history of this matter, that the Communities seek review of Judge Lovell's unexplained

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[1] State Respondents correctly point out that, by operation of law, Linda Vaughey and Bob Brown have replaced former Commissioner of Political Practices Ed Argenbright and former Secretary of State Mike Cooney, respectively.

refusal to prevent the vote on this single ballot initiative from occurring in the first place or from taking effect. Pet. 6-8. Thus, Respondents' attempt to recast the question to avail themselves of different, more onerous rules that apply to post-election challenges fails.

First, Respondents contend that the Communities' challenge was a post-election challenge and therefore untimely. Pvt. Resp. 8; *See* State Resp. 9 n.2. This argument fails as a matter of common sense and as a matter of law. The trial ended and Judge Lovell ruled, nearly two weeks before Election Day. Therefore, Judge Lovell had more than enough time to order the State of Montana to postpone the vote on the mining initiative. His inexplicable failure to do so does not mutate this case into a post-election challenge. Nor does it moot the question of pre-election relief. On the contrary, the controversy regarding Judge Lovell's tautological orders is still very much alive. In addition, no authority supports Respondents' timeliness argument when applied to challenges filed and decided well before the election.

Second, Respondents assert that only Fifth Amendment substantive due process violations can justify the relief the Communities seek. State Resp. 7; Pvt. Resp. 11. In Respondents' view, for example, total suppression of all political speech throughout an entire election season would not be grounds for postponement or invalidation of the election unless registered voters were somehow denied the ability to have their votes counted. This is absurd; therefore, the argument is invalid.

Third, after expending much energy pointing out the dearth of authority for preventing or invalidating elections for First Amendment violations, Respondents proceed to characterize this case as "a routine application of the abuse of discretion standard." Pvt. Resp. 8; *See* State Resp. 16. Thus, Respondents contradict themselves. *Certiorari* and reversal are necessary either because the Ninth Circuit radically departed from what should have been the routine granting of relief for suppression of political speech during an election, or because the time has come for this

Court unequivocally to establish routine relief for such a violation of the First Amendment.

I. Respondents' Rehashing Of Judge Lovell's Factual Determinations Has No Place In This Court, Especially Since The Trier Of Fact Rejected The Evidence On Which Respondents Rely.

Great swaths of Respondents' briefs are devoted to factual allegations directly contrary to Judge Lovell's factual determinations. Most tellingly, Respondents allege that corporations all over Montana "made a concerted effort *not* to participate in the campaign against [the mining initiative] in order to influence the district court regarding the onerousness of [the gag law]." State Resp. 8 (emphasis in original); Pvt. Resp. 15. That is Respondents' interpretation of a single sentence uttered, under cross examination, by former Montana Secretary of State Mike Cooney. Asked whether the electorate was "getting less information pro or con about the seven initiatives" on the ballot for the upcoming election, Mr. Cooney replied, vaguely, "there are people who are using this dispute . . . to make a statement about [the gag law]." Resp. App. at 61. In other words, Mr. Cooney offered his conclusory, self-serving opinion that the electorate was getting less information because of the gag law, but, contrary to Respondents' accusation, he did not allege "sandbagging." In any event, there is no indication whatsoever that Judge Lovell, as the trier of fact, put any credence in this tiny bit of unsupported, conspiratorial speculation. Instead, Judge Lovell's holding demonstrates that he did not believe Mr. Cooney. Mr. Cooney's testimony is therefore no reason to deny *certiorari*.

Respondents' factual allegations also include further, irrelevant speculation about what various entities could or should have done to exercise whatever meager free speech rights were left to them. For example, Respondents suggest several useless actions the Montana Mining Association (MMA) could have taken solely with regard to its members, such as soliciting funds from them and sending

newsletters to them. State Resp. 8; Pvt. Resp. 13. Respondents conveniently ignore that the gag law prohibited donations from MMA's corporate members, who comprise the bulk of MMA's membership. State Resp. 8; Pvt. Resp. 4. Furthermore, as State Respondents recognized, State Resp. 6, the MMA only had 450 members, State Resp. App. 28, whereas Montana had 639,241 registered voters in 1998. *http://www.state.mt.us/sos/assets/elections/98gen/98gen.htm*; Pet. 6-7 n.7. MMA members were well aware of the impact of the mining initiative; they did not need to hear from the MMA why it would kill jobs in Montana. Registered voters needed to hear that message, but, under the gag law, MMA could not tell them. This Court does not require anyone to engage in the futile exercise suggested by Respondents as a prerequisite to challenging a ban on political speech during an election.

Similarly, Respondents recite irrelevant testimony regarding MMA's and Montana Education Association's campaign expenditures before and during the enforcement of the gag law. State Resp. 7; Pvt. Resp. 5. These observations are irrelevant here because there is no evidence that the ballot initiatives opposed by either of these organizations in the past were sufficiently similar in popularity and backed by sufficiently similar proponents with sufficiently similar budgets and strategies. Most importantly, however, Judge Lovell did not find the testimony probative! Respondents' attempt at an armchair retrial is no reason to deny *certiorari*.

II. *Certiorari* Is Warranted, Despite Respondents' Misplaced Reliance On Inapposite Cases And Judge Lovell's Own Tautologies, Because The Communities' Timely Challenge Reached Final Decision Nearly Two Weeks Before Election Day.

Respondents' first legal argument is that the Communities waited too long to sue and, as a result, are not entitled to relief. Pvt. Resp. 17; State Resp. 10. This argument is grounded upon Respondents' absurd view that the Communities somehow waived or abandoned their rights

to free speech. Moreover, in light of Judge Lovell's praise for the Communities' success in assembling a cogent case such that he could decide the matter well in advance of Election Day, App. 7, this argument falls flat. Finally, the equally important – or more important – right of the electorate to hear speech could not have been waived. Pet. 13.

Respondents' timeliness argument also fails for lack of authority. For their assertion that this case was untimely, Respondents rely on Judge Lovell's decision in *Montana Mining Association v. Simonich*, CV 98-48-HCCL (D. Mont. March 19, 1999).[2] The Communities were not party to that case, however, and it was filed the day after the election. Pvt. Resp. App. 1-2. In stark contrast, the Communities, in this case, had sued months earlier. The *Simonich* decision is therefore irrelevant. Furthermore, comparison of Judge Lovell's decisions in this case and in *Simonich* crisply depicts the circularity of his logic. In *Simonich*, he ruled that unexplained failure to file suit before Election Day rendered the suit untimely. Pvt. Resp. App. at 14. But in the present case, amazingly, he denied the Communities' motion to enjoin the election because the election had not yet occurred. "Who knows?" They might win, he said and never elaborated one word further. Pet. 6-8, 26 n.7. *Certiorari* is required because this Court cannot allow Judge Lovell or Respondents to have both sides of this argument when survival of political speech in a ballot election, pursuant to the First Amendment, hangs in the balance. Pet. 11-14.

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[2] State Respondents also contend, in a footnote, that the *Simovich* decision "lays out in great detail [Judge Lovell's] reasons for denying" relief in the present case. State Resp. 9 n.2. Given that the Communities were not even parties to the *Simovich* case, State Respondents' assertion is problematic at best. In addition, the *Simovich* decision details only a latches argument in that post-election challenge. It is inapposite here, where Judge Lovell's final decision predated Election Day by nearly two weeks.

III. *Certiorari* Is Necessary, Despite Respondents' Absurd Contention That Only Substantive Due Process Violations Can Justify Relief, Because Severe, Late-Season Suppression Of Political Speech Surely Warrants Brief Postponement Of An Election.

Respondents characterize this case as a question merely of spending money (albeit to engage in speech and to spread the Communities' views to Montana's voters), as though the Communities sought only to buy office supplies. State Resp. 7; Pvt. Resp. 11. There can be no doubt, however, that expenditure of funds on a ballot campaign prior to an election is political speech that commands the full attention of this Court. *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 n.9 (1986) (Brennan, J., for the Court) ("the activity that may be discouraged in this case, independent spending, is core political speech under the First Amendment").

Nevertheless, Respondents contend that only substantive due process violations, not First Amendment violations, can justify the relief sought by the Communities. State Resp. 6; Pvt. Resp. 10. State Respondents argue that the mining initiative should continue to encumber the Communities' livelihood because "[n]o potential voters were disenfranchised, no improper ballots were cast or counted, and no established election procedures were ignored." State Resp. 6, 17. Similarly, Private Respondents insist, "invalidating the [mining initiative] election is not remotely justified [because] . . . no . . . Montana voter was prevented from casting a ballot . . . and there are no special circumstances such as fraud or egregious racial discrimination. . . . " Pvt. Resp. 10-11.

A moment's thought dispels these contentions thoroughly. Respondents' contention that the total abridgement of political speech during an election campaign is not an "egregious" constitutional violation must be rejected. For in Respondents' ridiculous view, even if the FCC were to block all broadcasts opposing reelection of the President, there would be no legal grounds for postponing the

election as long as registered voters were allowed to vote and their votes were counted. In fact, Respondents would insist that judicial relief from such a bar on political speech would be unavailable, even if this insidious action: were announced on Memorial Day; went into effect on Independence Day; were challenged on Labor Day; and were struck down after a full trial eleven days before Election Day. (The chronology bears a deliberate resemblance to this case.) Such results are self-evidently absurd. Although there has been no substantive due process violation either in this scenario or in this case, there has been a rather obvious violation of the rights to utter and to hear political speech. Consequently, it should also be obvious that elections, in which political speech has been selectively suppressed as it was here, should be postponed until free and full debate can occur. Respondents' substantive due process argument therefore is no bar to the granting of *certiorari*.

In support of their absurd contentions, moreover, Respondents cite only post-election challenge cases, or cases in which the district court did, in fact, enjoin or invalidate a normally scheduled election until the court was satisfied that it could be conducted constitutionally, such as *Connor v. Williams*, 404 U.S. 549, 550 (1972) and *Cook v. Luckett*, 735 F.2d 912, 915 n.3, 923 (5th Cir. 1984), respectively.[3] State Resp. 6; Pvt. Resp. 9-10. The present

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[3] In *Cook*, the district court enjoined the vote after a pre-election challenge. *Cook v. Luckett*, 575 F.Supp. 479 (S.D. Miss. 1983). Later, the district court permitted the election to take place, but only after the court had approved the districting plan. 735 F.2d at 917. Later still, the Fifth Circuit vacated "such part of the lower court's injunction as may now remain in force," but did not invalidate the election. It chose not to do so, however, because, as it wrote, "we are unsure whether the [challenger] urges us to upset the elections." *Id.* at 921. The Fifth Circuit's refusal to overturn the election in *Cook* therefore has no importance in the present case, where there is no doubt the Communities seek restoration of the *status quo ante*.

case, of course, is a pre-election challenge and Judge Lovell should have enjoined the vote as the *Cook* court did. *Certiorari* is necessary as a result.

IV. Even If Respondents Were Correct That There Is No Authority For Postponing Elections Due To Campaign-Season Suppression Of Political Speech, This Court Should Grant *Certiorari* To Ensure Protection Of The First Amendment.

Finally, after their vigorous attempt to demonstrate a dearth of precedent for granting the relief sought, Pvt. Resp. 9-11, Respondents paradoxically assert that this case presents a "routine application of the abuse of discretion standard," Pvt. Resp. 8. In other words, they contend Judge Lovell's completely unexplained refusal to grant relief was a perfectly common "blend of what is necessary, what is fair, and what is workable." *Id.* at 16. Both contentions – that this case is rare and that it is common – cannot be true simultaneously. If there were no authority on point, then campaign-season abridgement of the rights to utter and to hear political speech cannot be routine. If it were routine, then there would be abundant case law on point.

In reality, there is ample authority for relief: this Court's own decisions. Although the Communities themselves pointed out that no case before has presented a situation precisely like this one, Pet. 28, an absence of identical fact patterns is hardly the same as a total lack of controlling authority. Rather, as the Communities detailed at great length, this Court has made clear that the First Amendment must be protected or the entire constitutional system could fall. Pet. 11-14. In this case, all courts below have agreed that unconstitutional suppression of speech tainted the election and that this challenge was filed and decided before the election, but the courts allowed the election to proceed and to take and remain in effect anyway. Consequently, *certiorari* is necessary to correct the Ninth Circuit's failure to comply with

this Court's teachings regarding the sanctity of First Amendment protected speech.

Even if this Court's decisions were convincingly distinguishable, moreover, this case presents anything but a routine exercise of discretion. Respondents' protestations to the contrary are baseless. Attempting to demonstrate the propriety of Judge Lovell's denial of relief, State Respondents allege, again without benefit of citation to the record, that Judge Lovell "determined": "that invalidating the [mining initiative] election . . . was not necessary"; "that invalidating the [mining initiative] election . . . would not be fair to the Montanans that cast their votes in good faith support of it"; and "that invalidating the [mining initiative] election . . . would not be workable under the circumstances." Resp. at 16, *citing Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). These contentions are completely unsupported in the record, which explains why Respondents did not cite it. In fact, as described in great detail in the Communities' petition, Judge Lovell made no findings whatsoever with regard to the mining initiative election, other than that if the Communities won the election, there would be no need for him to intervene. Pet. 5-8, 26 n.7. Instead, Judge Lovell devoted his entire decision regarding the gag law to his factual finding that the Communities had been "silenced" and to his legal conclusion that such suppression of speech is unconstitutional.

Truly proper application of the "necessary, fair and workable" test actually favors *certiorari*. First, there can be no doubt that it is "necessary" to protect political speech. Pet. 11-14. Next, all courts in this case have agreed that it was not "fair" – in fact, it was unconstitutional – to gag the Communities during the election campaign. Even if it were true that unfairness would result to voters who voted "in good faith," as Respondents contend without benefit of citation to the record or to authority, this Court has never held that voting "in good faith" may be balanced against, and held superior to, the right to engage in and hear political speech in an election

campaign. On the other hand, it is beyond dispute that this Court has held that protection of political speech is absolutely necessary to ensure that voters are informed before they vote. Pet. 11-14. In fact, if "fairness," rather than a constitutionally untainted election, is the goal, it would be more fair to allow the Montana electorate to vote again, after a free and full opportunity for public debate. Finally, postponement of the vote on the mining initiative was surely "workable," and remains so. Pet. 23 n.6. Judge Lovell could have required a delay, as the Communities first requested, or easier still, he could have allowed the election to proceed but enjoined certification of the mining initiative election results, as the Communities requested next. Then, Judge Lovell could, and should, have left it up to the State of Montana to reschedule the vote for whenever it saw fit, so that Montana could make its own judgment about costs and timing – subjects on which the record is completely silent. *Marks v. Stinson*, 19 F.3d 873, 889-90 (3rd Cir. 1994); Pet. 23 n.6. Because Respondents' arguments as to "necessary," "fair," and "workable" are not supported by the record or case law and, in fact, conflict with the holdings of Judge Lovell as to the facts of this case and of this Court as to the sanctity of political speech, *certiorari* should be granted.

CONCLUSION

For all of the foregoing reasons, this Court should grant the Communities' petition for *certiorari*.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA MINING ASSOCIATION, NORTHWEST MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, GOLDEN SUNLIGHT MINES, INC., YELLOW BAND GOLD, INC. AND CONTINENTAL LIME, INC., Plaintiffs, v. ED ARGENBRIGHT, in his official capacity as Montana Commissioner of Political Practices, MIKE COONEY, in his official capacity as Montana Secretary of State, Defendants.	CV 98-37-H-CCL COMPLAINT FOR DECLARATORY RELIEF (Filed Sep. 1, 1998)

NOW COME the Plaintiffs, by and through their respective counsel, and seek an order of declaratory judgment pursuant to 28 U.S.C. § 2201-02, finding that § 13-35-227, MCA, (as amended by Montana Initiative I-125 and modified by a subsequent order of this Court) is unconstitutional as applied to Plaintiffs in that it impermissibly restricts their First Amendment rights of free speech and freedom of association with respect to Plaintiffs' desire to oppose Montana Ballot Initiative I-137, an

initiative currently certified and on the ballot for the November 1998 general election.

* * *

> (4) The provisions of subsection (1) prohibiting corporate contributions to or expenditures in connection with a ballot issue do not apply to a nonprofit corporation formed for the purpose, among others, of promoting political ideas and that:
>
> (a) does not engage in business activities;
>
> (b) has no shareholders or other affiliated persons who have a private claim on the corporation's assets or earnings;
>
> (c) does not accept foreign or domestic for profit corporations as members; and
>
> (d) does not accept in the aggregate more than 5% annually of its total revenue from foreign or domestic for profit corporations.

§ 13-35-227, MCA.

47. Defendant Commissioner has stated that he will enforce I-125 against for-profit corporations or not-for-profit corporations (such as Plaintiffs) if they, or other business entities or organizations similarly situated to them contribute directly to a campaign committee opposing or supporting a ballot issue or directly make an expenditure for or against a ballot issue. (*See* attached letter from Commissioner Argenbright as Ex. B).

COUNT I

FREEDOM OF SPEECH, EXPRESSION AND ASSOCIATION

48. Plaintiffs reallege, and incorporate as though fully set forth herein paragraphs 1-47 of this Complaint.

49. The Plaintiffs, and their respective for-profit and not-for-profit members have a constitutionally protected right to engage in political speech and association and to make contributions and expenditures in support of or in opposition to ballot issues.

50. The degree of protection afforded to the Plaintiffs constitutionally protected rights of free speech and association is heightened when their assets and way of life are threatened, as they are by the proposed initiative.

51. The threatened enforcement of the civil penalties for violating I-125, forces Plaintiffs to choose between either engaging in their rights of free speech and association to protect their economic interests (thus facing civil enforcement proceedings against them) or foregoing the exercise of those rights to avoid such enforcement proceedings and risk the loss of assets and a way of life.

52. I-125 impermissibly chills the Plaintiffs' rights to engage in political speech and association.

53. I-125, therefore, abridges the First Amendment rights of the Plaintiffs and their respective for-profit and not-for-profit corporate members.

WHEREFORE, Plaintiffs request relief as follows:

1) That the Court order such preliminary injunctive relief as may be requested by separate application therefore;

2) That the Court issue a declaratory judgment ruling and order which declares I-125 to be a violation of the United States Constitution's First Amendment right to free speech as applied to Plaintiffs or other persons, corporations or associations similarly situated, together with a permanent injunction against enforcement of I-125; and

3) That the Court provide such other and further relief as this Court deems proper under the circumstances.

Respectfully submitted this 1st day of September, 1998.

GOUGH, SHANAHAN, JOHNSON & WATERMAN

/s/ Alan L. Joscelyn
One of the Attorneys for
Plaintiffs Golden Sunlight Mines, Inc.

MOUNTAIN STATES LEGAL FOUNDATION

/s/ J. Scott Detamore
One of the Attorneys for Plaintiffs
the Montana Mining Association,
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Ltd. Yellow Band Gold, Inc. and
Continental Lime, Inc.

CHRISTENSEN, MOORE, COCKRELL & CUMMINGS, P.C.

/s/ Dale R. Cockrell
One of the Attorneys as Local Counsel for Plaintiffs MMA, NWMA, CGN, Yellow Band Gold & Continental Lime, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

MONTANA MINING ASSOCIATION, NORTHWEST MINING ASSOCIATION, COMMUNITIES FOR A GREAT NORTHWEST, YELLOW BAND GOLD, INC., CONTINENTAL LIME, INC., GOLDEN SUNLIGHT MINES, INC.,

Plaintiffs,

v.

ED ARGENBRIGHT, in his official capacity as Montana Commissioner of Political Practices, MIKE COONEY, in his official capacity as Montana Secretary of State,

Defendants,

and

LEAGUE OF WOMEN VOTERS OF MONTANA, MONTANA COMMON CAUSE, MONTPIRG 2030 FUND, AND CITIZENS FOR I-125,

Defendant-Intervenors.

Civil Docket
No. 98-37-H-CCL

TRANSCRIPT OF BENCH TRIAL PROCEEDINGS

Heard in Courtroom No. 551
United States Courthouse
301 South Park
Helena, Montana
October 21 and 22, 1998

BEFORE THE HONORABLE CHARLES C. LOVELL

UNITED STATES DISTRICT JUDGE

* * *

October 22, 1998

Page 241, Line 15

THE COURT: Thank you.

The matter then is deemed submitted to the court for decision.

* * *

Page 244, Line 9

I want to thank the lawyers in both cases. I didn't dream that you could present the volume and the quality of evidence that's been brought forth here. It is surprising to me.

I also appreciate the way that you've cooperated with each other to get these cases before the court and get them decided. It is unusual that a case such as the mining case here can be filed one month, tried the next month, and decided that same month.

Court's adjourned.

(The proceedings in this matter were adjourned at 10 p.m.)